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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

THE INTERSTATE COMMERCE COMMISSION,
THE WILLETT COMPANY OF INDIANA, INC.,
and the PENNSYLVANIA RAILROAD COMPANY,
Appellants,

vs. No. 507
508

HARRY A. PARKER, Doing Business as
PARKER MOTOR FREIGHT, REGULAR
COMMON CARRIER CONFERENCE OF THE
AMERICAN TRUCKING ASSOCIATIONS, INC., et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA

BRIEF FOR APPELLEES, HARRY A. PARKER, d/b/a PARKER MOTOR FREIGHT, REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., CRESTON TRANSFER COMPANY, AND CONSOLIDATED FREIGHT CO.

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Dated at Lansing, Michigan, March 5th, 1945.

AMERICAN BRIEF AND RECORD CO., GRAND RAPIDS, MICHIGAN

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STATEMENT OF THE CASE

(Figures in parentheses refer to pages of printed record unless context clearly indicates otherwise)

This case originated with an application filed with the Interstate Commerce Commission by The Willett Company of Indiana, Inc. The applicant is the wholly owned subsidiary of the American Contract Company which, in turn, is wholly owned by the Pennsylvania Railroad Company. The applicant sought a common motor carrier certificate over some seven separate routes aggregating in excess of 650 miles between Fort Wayne, Indiana and Mackinaw

City, Michigan. These seven separate operations are the subject of seven separate contracts and are to be carried on over highways which roughly parallel the entire lines of the Pennsylvania Railroad in Michigan.

The motor carrier service as proposed will serve only the intermediate points on the seven separate segments. No through service over the several routes would be offered. The service on each of the routes will be conducted without reference to that on any other route. The railroad owner and the applicant say that the freight will, in some instances, move by rail to certain key points where it will be transferred to the motor truck operation. The railroad, however, was unwilling to accept a limitation restricting its subsidiary, the applicant, to transportation of freight having a prior or subsequent rail movement. As the proposed order reads, therefore, the applicant will be enabled to and will handle merchandise which has had no such connection with the railroad. Freight will be handled as it is handled by other common motor carriers.

The application was partially heard on February 10th and 11th and the hearings completed on June 1st and 2nd, 1942. A large number of competing motor carriers took part in the proceeding. The two member Joint Board was unable to agree. The matter was withdrawn from their jurisdiction and a report and order proposed by an Examiner. Since this granted all that the applicant sought, the plaintiff in this proceeding and a number of other carriers filed exceptions. The Commission issued an order sustaining the Examiner on September 25, 1943. We then filed a petition for reconsideration which the Commission denied in an order dated February 8, 1944.

Suit to set aside the order of the Commission was instituted on February 21, 1944 before the United States District Court for the Southern District of Indiana, Indianapolis Division. Arguments were heard on April 28, 1944. The Court made its findings of fact and conclusions of law and issued a decree on June 30, 1944 reversing the Commission. This appeal was then taken by the Commis-

sion, the United States of America and the Applicant on August 22, 1944. We are now advised that the Attorney General will not file a brief and will not prosecute the cause. Their's was a separate appeal in Docket No. 508.

STATEMENT OF THE ISSUES

This case will determine whether the Certificate Section of the Motor Carrier Act* must be applied equally to all applicants. The statute under attack has been applied in a manner never employed when the applicant is not railroad owned. It has been applied in a fashion that can only be employed when the applicant is rail owned.

The question is here presented as to whether, in a case brought under the Motor Carrier Act, a railroad owned applicant can prove that a new common *motor carrier* operation is "required by the public convenience and necessity" by: (1) comparing its owner's *railroad* service with motor carrier service and; (2) having its railroad owner refuse to make use of existing adequate motor carrier service.

The case has been determined on an interpretation of the statute that must always produce a grant to all rail-owned applicants.

The principal questions are:

1. Has the Commission applied an erroneous rule of law.

2. Has the Commission failed to take into account facts that should have been considered.

3. Has the Commission based the order on criteria that should not have been employed.

4. Does the order contain proper findings.

5. Is the order based upon improper findings.

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*Section 207 of Part II Interstate Commerce Act

6. Are the findings supported by substantial and lawful evidence.

7. Can it be rationally inferred from the evidence that the public convenience and necessity required the service.

8. Were the protestants denied due process.

SUMMARY OF ARGUMENT

The controlling issues stem from the meaning given by the Commission to the phrase "required by the public convenience and necessity". It has determined that this statutory language is satisfied by finding that: (1) since the railroad is now furnishing rail service between the points, it has an obligation to continue to do so as a motor carrier; (2) the proposed service is desirable because it is more efficient than rail service; (3) it will be more economical for the railroad and; (4) it is different from ordinary motor carrier service because it is in substitution for rail service and, therefore, existing carriers cannot furnish it as well as the applicant (10-11).

The appellants contend: (1) that these findings are sufficient; (2) that they are supported by the evidence and; (3) that the Commission is the sole judge as to what will prove that public convenience and necessity requires an operation.

We contend that: (1) the Court cannot be ousted of its jurisdiction — that it has the duty of determining whether the order rests on a sound legal basis; (2) the case was decided before hearing upon an unlawful interpretation of the statute founded on a preconceived opinion that all joint service between railroads and motor carriers must be performed by rail owned motor carriers; (3) the findings made are not those required by the statute; (4) the order is based on a discriminatory application of the statute — an interpretation that would not have been applied if the applicant had not been rail owned; (4) the Commission has employed improper criteria — the standards employed are not those upon which the order can stand; (6) the order is based on conditions in the rail-

road field instead of those in the motor carrier field contrary to the mandate of Congress to treat each form of transportation separately; (7) the findings are not supported by substantial evidence but instead are contrary to the evidence; (8) the evidence would not support the order even if proper findings had been made; (9) the order is ambiguous and lacks a clear statement of the reasons for the ultimate conclusion and; (10) the protestants were denied a fair hearing.

This is an application under the Motor Carrier Act for a common motor carrier certificate by a railroad owned motor carrier. The railroad is not the applicant and the proceeding is not one for the extension of a railroad. This railroad interest does not change the issues and should not have been given any weight. The case should have been determined on the sole basis of evidence concerning common motor carrier service and conditions. Congress has so decreed. It intended that each form should be regulated without reference to any other form.

The Commission has disregarded these Congressional injunctions in all cases where a railroad or its subsidiary is the applicant. Every such application has been determined on the basis of arguments relating solely to conditions in the railroad field. Uncontradicted evidence relating to conditions in the motor carrier field has been ignored. Regulation of this class of motor carrier applicants has been undertaken on the sole basis of conditions relating to a totally different form of transportation. These errors are apparent on the face of the order itself.

In all cases where the applicant is non-rail owned, the Commission has held that conditions in other fields of transportation are not to be considered. *No motor carrier certificate has ever issued to a non-rail motor carrier applicant on the strength of a showing that rail service was inadequate or could be improved.* It has always been necessary for such applicants to show that motor carrier service — not rail service — was inadequate.

No railroad has ever secured the right to construct a new railroad or an extension by showing that existing motor carrier or water carrier service was inadequate. Al-

ways it has been necessary for such applicants to show that existing railroad service was inadequate. No water carrier applicant has ever been granted a certificate just because the service would represent an improvement over some other form of transportation. Each form has always been regulated on the basis of conditions in that one field. These motor carrier applications by railroads and their subsidiaries are the only departures from the Congressional mandate.

Appellant's principal arguments stem from a contrary viewpoint. The claim that the proposed motor carrier service will be better than rail service is at the bottom of almost everything they say. They argue that the tests applied to all others do not apply here. They say that the Commission finding that the proposed service will be more efficient than railroad service and that it will effect savings to the railroad is sufficient because the power to decide what constitutes proof of public convenience and necessity is confided exclusively to the Commission. The doctrine of administrative finality as to facts has no application. They confuse the right of the Commission to weigh and consider the evidence with the power and duty of the Court to determine whether the evidence and the findings based thereon are "those upon which its action can be sustained."

In his concurring opinion in the St. Joseph Stock Yards case, Mr. Justice Brandeis expressed our position on one point in the best possible language when he said:

> "Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a State."
>
> *St. Joseph Stock Yards Co. v. U. S.*, 298 U.S. 74.

In that same opinion we also find a summation of the powers and duties of this court. Every ground for revers

ing an order set out in this summation applies particularly to this case:

> "It may set aside an order for lack of findings necessary to support it, *Florida v. United States*, 282 U. S. 194, 212-215; or because findings were made without evidence to support them, *New England Divisions Case*, 261 U. S. 184, 263; *Chicago Junction Case*, 264 U. S. 258, 262-266; or because the evidence was such 'that it was impossible for a fair-minded board to come to the result which was reached,' *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442; or because the order was based on evidence not legally cognizable, *United States v. Abilene & Southern Ry.*, 265 U. S. 274, 286-290; or because facts and circumstances which ought to have been considered were excluded from consideration, *Interstate Commerce Commission v. Northern Pacific Ry.*, 216 U. S. 538, 544-545; *Northern Pacific Ry. v. Department of Public Works*, 268 U. S. 39, 44; or because facts and circumstances were considered which could not legally influence the conclusion, *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 42, 46-47; *Florida East Coast Ry. v. United States*, 234 U. S. 167, 187. . . . . (74,75).

The standards established in U. S. v. Carolina Freight Carriers Corpn., 315 U. S. 475 and Eastern-Central Motor Carriers Association v. U. S., 88 L. 431 and the reasoning the Court uses in those cases apply here with equal force.

Existing service must be considered. It cannot be said that a new carrier is required if those operating can furnish all the service the public needs. The cases indicate Commission agreement with this interpretation. In their briefs the appellants now argue that the proposed service had already been found to be "different" from ordinary motor carrier service as a pure matter of law and that, therefore, it must be assumed we cannot furnish it as well as the applicant. This assumption is contrary to all evidence and is an erroneous and discriminatory interpretation of law, as we shall demonstrate. But we contend that

a *motor carrier* case cannot be decided on evidence dealing only with *railroad* service as has been done here. We contend that rail service is not to be considered at all in a motor carrier case. *But certainly if it is given weight such action can only be justified by arguing that the Commission may take all kinds of service into account. Such a theory would not warrant a grant unless it was shown that both rail and truck service was inadequate.* The appellant's chief argument is that a motor carrier certificate may issue without giving consideration to existing motor carrier service — that the condition of rail service is the sole consideration. The decision is based on an erroneous interpretation of the law.

The Commission has held that:

> "Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the community — the words imply an urgent immediate public need."
>
> *Public Convenience Application of A. & S. A. B. Ry.*, 71 I. C. C. 784.

Uncontradicted evidence establishes that present railroad and motor carrier service is adequately serving the public. There is no evidence to show that there is any "urgent immediate public need" for any improvement in either rail or motor carrier service. That this grant may result in service better than present rail service, is not proof that such a need exists.

But even if it had been shown that present rail service was so poor that it must be improved, such fact would not establish that the railroad must be granted the right to start a *motor carrier* operation. *If the rail service is that poor, the Commission has ample power to compel improvement.*

What the Commission really means is that while rail service, as such, is satisfactory, motor carrier service is better. This inherent advantage, being always present, must always result in the grant of a motor carrier certificate to an applicant railroad. But it never results in such

action where the applicant is not rail owned. That is why we say that the order would not have issued if the applicant had not been rail owned.

But these arguments by the appellants do not touch the real basis for the Commission action. This nebulous theory they advance requires the Court to speculate and guess at what the Commission intended. We cannot disregard the plain language of the order. Its two major grounds for the grant are:

1. "While several motor carriers operate over portions of the routes involved and in some cases perform similar station-to-station service for the Pere Marquette Railroad, it must be borne in mind that the railroad has been and is transporting the traffic in question between its stations and is under an obligation to continue to do so."

2. "We are not impressed by protestant's contentions and are of the opinion that the proposed co-ordinated service will serve a useful public purpose, and that such useful public purpose cannot be served as well by existing motor carriers" (10-11).

Plainly these two assertions are statements of principles of law — principles that have guided and controlled the decision. The first asserts that as a matter of law, the legal obligation of the railroad to operate as such compels the grant of a right to also operate as a motor carrier regardless of all other facts or conditions. If that is the law, then no evidence can have any effect on the outcome. The balance of the order is surplusage — and it is completely without force since the legal principle upon which the order turns is unsound.

But the railroad is not the applicant. The service proposed is a joint or connecting line service in part at least. The "obligation" of one connecting line carrier does not give it the right to transport beyond the point of transfer as this finding assumes.

Part of the service proposed will have no connection with the railroad. The applicant will pick up, transport

and deliver wholly by motor truck without any prior or subsequent move by rail. Clearly this finding means that, as to such service, the "obligation" of the appellant's owner is a general one to transport — not to transport by rail only. The mere fact of rail ownership, therefore, is considered ample proof that the public convenience and necessity requires the grant of a motor carrier certificate.

Obviously it cannot apply to a non-rail owned applicant. Only railroads have an "obligation" to function as a railroad. Would it be contended that the corresponding "obligation" of a motor carrier to operate as a motor carrier carried with it the right to also operate as a railroad? And if not, is not the discrimination self-evident?

The second controlling principle advanced makes it a matter of law that if, in Commission opinion, the applicant can perform *better* than the existing carriers, the new line must be "required by the public convenience and necessity". This amounts to saying that as a pure legal proposition, the fact that a new carrier may be able to *better* perform compels the grant of a certificate *even though the service the public is receiving is completely satisfactory and adequate.*

This oblique way of saying that existing service is inadequate is not the clear unambiguous finding required. It is contrary to all of the evidence. In fact it is not based on evidence at all but rather on a wholly untenable theory.

The applicant's railroad witnesses admittedly had no knowledge of existing service. We presented uncontradicted proof that we are furnishing the desired service satisfactorily for another railroad. Applicant's shipper witnesses admitted that existing motor carrier service is satisfactory. The same is true with respect to rail service. The order finds that we are furnishing this service just as it also finds that the applicant is furnishing it in other states. All the evidence, therefore, disputes the finding that we cannot furnish the service "as well as" the applicant. It cannot be rationally inferred that we cannot furnish it "as well as" the applicant.

The rule of law that has been substituted for evidence began, in prior cases, with an assumption that there are two kinds of common motor carrier service. The first is that having no connection with rail movements. The second is that involving a joint or connecting line operation.

In the first cases the Commission agreed that there could be no grant to a railroad of the right to perform the first or ordinary type of service since existing carriers could satisfactorily perform it. *In the absence of proof that existing motor carrier service was inadequate, a railroad could not be authorized to furnish this regular or ordinary type of motor carrier service.*

At the same time, however, the Commission did grant the railroad a common motor carrier certificate permitting joint or connecting line service. We shall demonstrate that this was done on the strength of a Commission belief that could not be changed by evidence.

The Commission started off with the seemingly fixed idea that all connecting line operations between railroads and motor carriers were "different" and that, therefore existing motor carriers could not furnish that type of service. No adequate explanation of what creates this "difference" was ever given. The more it is "explained," the clearer it becomes that there is no "difference" — *that in Commission opinion, rail ownership or service for a railroad automatically makes any motor carrier service "different"*. The Commission had the preconceived notion that only rail owned motor carriers could furnish it. They conceded that public convenience and necessity could not require the creation of a new carrier if existing carriers could furnish the service but found that existing carriers could not do so because it was a "different" or "co-ordinated" service. Their argument on brief hangs on that one contention.

Soon, however, the Commission went all the way with the railroads and removed the restriction which had prevented the performance of ordinary or pure motor carrier service. The basis for the change is buried in obscure and difficult language but appears to be no more than ac-

ceptance of the railroad argument that it cannot perform this "different" or "co-ordinated" service with profit to itself unless it also has the right to perform the other type.

At the same time the Commission continued to advance exactly the same arguments in identical language that had been used when it was restricting the service to this allegedly "different" service. It continued to call this a "different" "rail-truck" service and to speak of it as something requiring "close co-ordination" because it was a joint or connecting line service, yet granted certificates that permitted the performance of pure motor carrier service.

Our case is the direct descendant of those cases. Exactly the same language is used. The Commission claims that the operations will be "different" because they will be in substitution for train service yet authorizes the performance of pure motor carrier service that is not a "substituted" service. It calls it a "new form" of service to be operated in "close co-ordination" with the railroad yet plainly permits the applicant to perform ordinary unco-ordinated motor carrier service having no closer relationship to the railroad than ownership of the carrier. On this basis it concludes that we cannot perform this allegedly "different" service "as well as" the applicant — inferring that existing service is inadequate.

But the evidence shows without contradiction that there is adequate service of both kinds. *No witness said otherwise.* If part of the service is "different" despite the uncontradicted proof to the contrary, the record still shows that we can adequately supply it — that we are in fact doing so for another railroad. The only support for the order, therefore, must be found in the preconceived Commission opinion that this joint or connecting line service demands common ownership — that it demands rail ownership of both carriers.

Even so, this cannot furnish even moral support for the grant of a right to furnish the common or garden variety of pure motor carrier service. The grant of a right

to perform ordinary or unco-ordinated motor carrier service is, therefore, without support in fact, theory or argument.

The order embraces the right to furnish both kinds of service over seven separate routes covered by seven separate contracts. An independent motor carrier is presently furnishing service on one of those routes. He had been doing so for years. There can be no doubt, therefore, about his ability to perform "as well as" the applicant. No complaint was registered against his service. Yet the order will utterly destroy that carrier.

The mere fact that seven separate routes are combined in one application does not remove the necessity of the applicant's proving that the service on each of those routes is inadequate.

Many other defects will be discussed in detail in the body of this brief. We mention one other important one. The conduct of the case violated every rule of justice and fair play. The relations between the railroad and its subsidiary are presumably covered by seven contracts. One of them was exhibited to the Joint Board but we were deprived of all opportunity to see it or to use it in examination of any witness. The applicant was then permitted to file it after the hearing had closed. Everything in the order based on the alleged "difference" of the proposed service from that of ordinary motor carrier service could have been shattered through our use of this document if it had not been withheld from us.

This case and the one following it on the calendar are alike in the basic issues. While there are obvious procedural and evidentiary differences, the basic concepts upon which the Commission orders stand are precisely the same. The Attorney General made substantially the same arguments we here present in the trial of the other case below. He opposed the grant in that case and his arguments parallel our own. We used them in the Court below in the trial of this case. We have adopted portions of his argument to show its complete agreement with our own

position on the controlling issues. His reason for not supporting the commission in the appeal will be readily apparent.

The Court will find it difficult to understand the precise basis for the Commission order. Much is left to conjecture and surmise. We shall show that the applicant's proof dealt primarily with railroad convenience.

It is our contention that the theory upon which this case has been determined must always result in the grant of a certificate to a railroad applicant. We contend that the tests the Commission suggests are not tests at all but rather an ambiguous way of saying that all railroads should be permitted to operate as motor carriers. We submit that the tests can apply only to railroad applicants and that for that reason they are obviously discriminatory.

We contend that the Commission has wrongly defined the statute — that its errors stem from that fact. We contend that the evidence cannot rationally be given the legal effect placed upon it by the Commission. The decisions of this Court which hold that an order must be set aside if it could not rationally have been reached by a fair-minded person, apply with especial force in this case.

The railroad position on brief is that only a rail-owned carrier can satisfactorily supply motor carrier service for a railroad. They claim that the prior cases have made that an inflexible rule. Thus do they forever foreclose opposition. Thus do they invent a rule that can only apply to rail-owned applicants. Their brief sums up to a contention that the inherent differences in the two forms of transportation satisfies the statute regardless of the fact that present rail and motor service is adequate.

The railroads have construed the Commission formula in exactly the manner we describe. At the very outset of our case the railroad argued that the case had already been determined by the findings in prior cases. On the strength of this belief the railroads of the nation are now embarking on wide scale invasions of the motor carrier field. The Pennsylvania Railroad presently has an appli-

cation pending that will duplicate substantially all of its remaining mileage in Ohio. It has already duplicated most of its mileage in the other states in which it operates. It has no less than twenty-two motor carrier subsidiaries. It is no idle statement to say that through this doctrine the railroads of the nation will be able to automatically engage in competition as a motor carrier with every other motor carrier and to carry on operations from coast to coast.

ARGUMENT

At the outset, we want to make it perfectly plain that we are not inviting the Court to weigh the evidence in the usual sense of that phrase. But we do ask the Court to apply the doctrine set out in *Crowell v. Benson* in which it said:

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, *does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.*"
>
> *Crowell v. Benson*, 285 U. S. 56-7.

We especially make the point that the order does not contain the basic findings of fact required by the statute and the decisions of this Court:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts

conditioning its power. *Florida v. United States*, 282 U. S. 194, 215; *United States v. Baltimore & Ohio R. Co.*, 293 U. S. 454." 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' *Florida v. United States*, supra. Orderly review requires that this objection, being basic and jurisdictional, be disposed of at the beginning."

United States v. Chicago M., St. P. & P. R. Co., 294 U. S. 504.

We are also making the point especially that the findings that are set out in the order are obscure and ambiguous. The further language of this Court from the case is especially applicable:

"We would not be understood as saying that there do not lurk in this report phrases or sentences suggestive of a different meaning. One gains at places the impression that the Commission looked upon the proposed reduction as something more than a disruptive tendency; * * * *The difficulty is that it has not said so with the simplicity and clearness through which a halting impression ripens into reasonable certitude: In the end we are left to spell out; to argue; to choose between conflicting inferences.* Something more precise is required in the quasi-jurisdictional findings of an administrative agency. *Beaumont, S. L. & W. Ry. Co. v. United States*, 282 U. S. 74, 86; *Florida v. United States*, 282 U. S. 194, 215. *We must know what a decision means before the duty becomes ours to say whether it is right or wrong*" (510-11).

This Court, in another case, has said:

"In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the

Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported."

Florida v. United States, 282 U. S. 215.

In yet another case, the Court said substantially the same thing in even stronger language:

"The Commission's failure specifically to report the facts and give the reasons on which it concluded that under the circumstances the use of the average or group basis is justified leaves the parties in doubt as to a matter essential to the case and imposes unnecessary work upon the courts called upon to consider the validity of the order. Complete statements by the Commission showing the grounds upon which its determinations rest are quite as necessary as are opinions of lower courts setting forth the reasons on which they base their decisions in cases analogous to this."

Beaumont, S. L. & W. Ry. v. U. S., 282 U. S. 86.

These rulings by the Court were affirmed again in *United States v. B. & O. R. Co.*, 293 U. S. 462. In a relatively recent case the Court used perhaps the most expressive language on this subject:

"But if the action is based upon a determination of law as to which the reviewing authority of the courts does come in to play, *an order may not stand if the agencies has misconceived the law.* In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained * * * *we merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.*"

Securities and Exchange Com. v. Chenery Corp., 318 U. S. 94-95.

In the case of *United States v. Carolina Freight Carriers Corporation*, 315 U. S. 488, the Commission repeated and strengthened the points and arguments set out above. The case also is authority for several other arguments we make in this brief. The Commission has deliberately departed from the standards created by Congress and has applied a discriminatory interpretation of the statute:

> "The precise grounds for the Commission's determination that only certain commodities could be carried and that only a few could be transported between designated points are not clear. It is impossible to say that the standards we have set forth were applied to the facts in this record. Hence as in the *Florida v. United States*, 282 U. S. 194, 215, 51 S. Ct. 119, 125, L. Ed. 291, *the defect is not merely one of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order'* * * * Congress has prescribed statutory standards pursuant to which those rights are to be determined. *Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen.* Congress has also provided for judicial review as an additional assurance that its policies be executed. *That review certainly entails an inquiry as to whether the Commission has employed those statutory standards.* If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. *If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away.* An insistence upon the findings which Congress had made basic and essential to the Commission's action is no intrusion into the administrative domain. It is no more and no less than an insistence upon the observance of those standards which Congress had made 'prerequisite to the operation of its statutory command' * * * Only when

the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence."

United States v. Carolina Freight Carriers Corp., 315 U. S. 488-9.

See also:

The Chicago Junction Case, 264 U. S. 258;
Interstate Commerce Commission v. U. P. R. R., 227 U. S. 547;
Texas & Pacific Ry. v. Gulf, etc. Ry., 270 U. S. 273;
Yonkers v. U. S., 321 U. S. 689.

One of our chief complaints about the order in this case stems from the fact that the Commission has applied an interpretation of the statute that it would not have applied if the applicant had not been railroad owned — that the Commission has made a most discriminatory application of the statute. This was condemned in most vigorous language in the Carolina Freight Carriers Case cited above. At one place, the Court in insisting that the proper criteria had not been employed said:

"We conclude that there is no statutory warrant for applying to irregular route carriers a different or stricter test as to commodities which may be carried than is applied to regular route carriers. * * * *In so far as that view establishes a different test for commodities which may be carried by irregular route operators than for commodities which may be carried by regular route operators it is erroneous as a matter of law.* For facts sufficient to establish that a person is a 'common carrier' by motor vehicle in 'bona fide operation' in the one case are sufficient in the other" (484-5-6).

Facts

The original plaintiff, Parker Motor Freight, is a very small carrier operating from Grand Rapids to points in the sparsely settled northern end of the Lower Peninsula

of Michigan. Traffic in that resort area is thought of in terms of pounds and pennies — not in terms of tons and dollars.

Since the case was started, every common motor carrier in the nation has joined the original plaintiff. Realizing the importance of the issues, the Regular Common Carrier Conference of the American Trucking Associations, Inc. have come to our support. These carriers appreciate the fact that there is but one issue — life or death. If railroads are to be permitted to enter the trucking business at will under a discriminatory application of the statute that has no relation to conditions in the motor carrier field, the days of an independent common motor carrier industry are numbered. If the Lower Court is reversed, the way is open to an absolute rail controlled monopoly in surface transportation. If the railroad is sustained in its arguments, then every railroad may obtain a motor carrier certificate for the mere asking.

The facts in this case are relatively simple. Ours is fairly typical of all these rail motor carrier cases. The Pennsylvania Railroad operates as a railroad from Fort Wayne, Indiana to Mackinaw City, Michigan, also serving several branch lines. A considerable number of motor carriers operate over the paralleling highways serving the same towns. No route or town is without motor carrier service. The railroad owns a subsidiary corporation engaged in operations as a motor carrier between other points served by the railroad. This subsidiary does not operate in the Michigan area involved in the application.

The railroad decided it wanted to institute a motor carrier service between all points on this Indiana-Michigan railroad division. It caused its subsidiary to file an application under the Motor Carrier Act. This application is in the regular form used by all motor carrier applicants. Applicant seeks a motor carrier certificate embracing some seven separate operations covered by seven separate contracts.

At the hearing the railroad and the applicant admitted that they had no knowledge whatever about the operations

or service of existing motor carriers. Indeed, they boasted that they had made no investigation. *The railroad emphasized that it would not make use of such existing motor carrier service under any circumstance — even if the service offered was superior to that proposed by its subsidiary.*

The applicant's proof dealt with benefits the railroad will receive if the certificate is granted. They compared the speed of rail service with that of the proposed motor carrier operation. They did not show that the railroad service was unsatisfactory to anyone or that any part of the public had objected to it. The railroad refused to accept any limitation that would prevent unrestricted motor carrier service between the points it desires to serve. They specifically explained, over our objection, why they did not want a restriction that would compel a prior or subsequent rail haul and made it clear that they expected to pick up at shipper's docks and transport directly to the consignee without any connection with the rails (127-131). The statement on page 8 of their brief that: "all freight will originate as railroad freight" is misleading. A careful reading of their explanation does not negative the statements made immediately above.

The attitude of the railroad and of the applicant is that the existence or non-existence of adequate motor carrier service is of no moment. They have tried the case on the theory that they need only show that the proposed motor vehicle operations would furnish, by comparison, a better service than the presently offered railroad service of the owner. The proof they presented was confined to showing that: (1) Merchandise could be handled with greater speed on motor vehicles than on the rails and; (2) such use of motor vehicles would be a benefit to the railroad owner of the applicant. They argue that such proof is sufficient to establish that the proposed new motor carrier operation is required by the public convenience and necessity. This was stated to be their position almost at the outset of the case when their counsel answered a question asked by the Chairman of the Joint Board:

"MR. EGGERS: In other words, Mr. Yockey, if it can be proven here that The Pennsylvania Railroad Company will improve its service to the public by the granting of this application, then that alone is sufficient, and it should be granted; is that correct?

MR. HARRY YOCKEY: Yes" (186).

Earlier in the case the applicant's counsel, in objecting to some of our questions about their witnesses' lack of knowledge of existing facilities, had this to say:

"MR. HARRY YOCKEY: Now, just a moment. We want to object to that. *The Commission has held in all of these rail cases that the Commission has no jurisdiction or authority to require a railroad to deal with an independent truck line.* The Commission has held that that is outside of its jurisdiction, and that *the railroad has a right to deal with its own subsidiary;* and the Commission has no jurisdiction or authority to require the railroad to do otherwise. Now, this particular question, as to whether he did or whether he did not make such an investigation that counsel refers to, is not pertinent to this particular issue."

We followed his statement of position with these words:

"MR. CLARDY: I contend, under the statute, that in every case it is permissible, and altogether proper, to find out whether the applicant, or any shipper, or anyone else who appears in support of the application, has made any investigation into the already available transportation facilities" (153).

Theirs was no hasty and ill-considered statement of position. In their Reply to our Exceptions, after the Examiner had held against us, applicant's counsel said:

"Protestants take the position that practically the only issue involved is the question as to whether or not there is available motor carrier service available by independent truck operators. They argue at length that if there is partial or complete available independent motor carrier service over the routes in ques-

tion that the Commission is powerless to grant a certificate to a subsidiary under circumstances such as we have in the instant case."

"This contention of the protestants is definitely decided contrary to the contention of the protestants in practically every one of the cases we are citing in this reply, and need not be replied to in detail" (844).

Nor is this all. In that same document they say:

"We have hereinbefore replied to the claims of protestants that convenience and necessity can only be had in a case of this type the same as if the application were by an ordinary motor carrier seeking an entirely new independent motor carrier's business. This of course is not the law. Whereas in the instant case the railroad is only seeking to improve a present existing service by substitution of trucks for way-car service" (860).

In their brief in the Lower Court they said:

"The purpose of the applicant and of The Pennsylvania Railroad Company, as stated by applicant's witnesses, among other things is the improvement of the service so as to retain the less than carload business which The Pennsylvania Railroad now enjoys and to more efficiently, expeditiously and economically serve their patrons * * *. It is the purpose of the Pennsylvania Railroad to retain by the institution of this improved new service that less than carload business which it now enjoys."

Willett Company Brief, Page 49.

As a sort of summary of their contentions, they set out the following on page 72 of that brief:

"The Pennsylvania Railroad has the right to select its own agent in performance of the agency involved in these proceedings, and that the Commission is without jurisdiction to compel it to deal with any agent other than its own choosing."

One other point was made crystal clear at the very outset. Applicant's counsel, in his opening statement, explained why the railroad did not wish a restriction in the order which would prohibit the applicant from picking up freight at the dock of the shipper for transportation directly to the consignee without any rail movement at any time. He explained that they wanted what they called the "key-point" restriction inserted in lieu of the "prior or subsequent" restriction that had been imposed in some other cases. He went to some length in explaining that the requirement of a prior or subsequent rail movement would, in some instances, be "detrimental to the railroad in its operation through this truck line in the rest of its movement" (77). He explained that the so-called "key-point" restriction would insure that the movements would be only to the intermediate points — that there would be no truck service between the larger towns named as such key-points. But, in making his explanation, he also succeeded in showing the Joint Board that they intended operating in exactly the same fashion as an ordinary motor carrier. A Joint Board member asked:

> "MR. BARKELL: I still do not just understand the difference between the two methods, or the two operations. Does not the key-point system require a rail movement?
>
> MR. HARRY YOCKEY: No, it does not.
>
> MR. BARKELL: Not at all?
>
> MR. HARRY YOCKEY: No, it does not. However, the Commission feels, in inserting that, that it does insure that it will keep that railroad business; and it is the intention of the applicant here to do that" (78).

One of counsel then asked Mr. Yockey:

> "MR. ANDERSON: Now, there is this other question also: If, as you say, you expect this business to be all railroad business, and not to be in competition with the common carriers by motor vehicle, why are you unwilling to have the 'prior and subse-

quent rail movement' clause inserted in your request in this application, or in your certificate, if one is granted?

MR. HARRY YOCKEY: Well, that would undoubtedly hamper us in connection with a percentage of our business" (79).

The real key to the attitude of the railroad and the applicant is to be found in another remark by their counsel in his opening statement:

> "The evidence here will further show that The Pennsylvania Railroad does not care to enter into this kind of arrangement with other truck lines" (76).

The applicant's case is based on the testimony of three witnesses — its General Manager and two employees of its owner, the Pennsylvania Railroad. The testimony of the shippers was unimportant to the applicant's theory and case, as we shall demonstrate below.

All three of their principal witnesses devoted most of their testimony to the subject of claimed benefits that would accrue to the railroad if its subsidiary should be granted the certificate. All of them made a point of the fact that they had no knowledge of existing motor carrier service. The first (rail) witness (Christie) stated:

> "I have not made any investigation whatever of any motor carriers along any of these seven routes and I have no desire to and I do not intend to" (414).

The second (rail) witness (Symes) admitted he had no knowledge of the existing motor carrier facilities. He was asked:

> "Q. Very well. Now, over my objection you were permitted to answer a question or two, and so was the preceding witness. I want to find out now if you made any independent investigation, either on behalf of the railroad company or its subsidiary, The Willett Company, into the available trucking service already in the field before this application was filed?
>
> A. I did not" (153-154).

Their third witness (McArdle), manager of the applicant, also admitted that he had no knowledge about any of the common carrier service available between the points covered by the application (234). At another point this important witness said:

"Q. (By Mr. Anderson) Do you know how many there are?

A. No, sir.

Q. And you never made any effort to find out, did you?

A. No" (205).

The shipper witnesses were not interrogated on that subject by the applicant. Since only four of those witnesses were sworn and presented on the stand, we shall set forth a few short citations from their cross examination to show that they either admitted that existing motor carrier service as well as their rail service was completely satisfactory, or that they had no knowledge on the subject.

Witness Caton:

"Q. You are receiving your shipments that come into you from Carolina points by The Pennsylvania Railroad satisfactorily, are you not?

A. Yes (245).

Q. You have no complaint to make against the service that has been rendered you by O. I. M., have you?

A. No (247).

Q. In other words, then, with the service which you are receiving at the present time, both from the Pennsylvania Railroad, as it is now operating, and from the various trucking lines that are serving you, I take it that your transportation needs are adequately served, are they not?

A. As best I know (248).

Q. Was that because the type of service which you are receiving and have been receiving from the railroad, was good enough to take care of your needs?

A. Yes, sir (255).

Q. Now, Mr. Witness, then as I understand the situation, your transportation needs at the present time are, generally speaking, pretty well taken care of; is that correct?

A. Quite well, yes (258).

Q. Do you know anything about The Willett Company?

A. No, sir" (245).

Witness Button:

"Q. Associated Truck Lines has been serving your company for a great many years, has it not?

A. Yes.

Q. And the service has been pretty good, has it not?

A. Well, yes.

• • •

Q. And that is generally true of the other common motor carriers also; is it not?

A. Yes, sir — it is generally true (270-271).

Q. Has the rail service when you used it to and from Fort Wayne, been satisfactory to you?

A. Well, as far as we know it has, yes, sir; but of course, I cannot speak for our customers. In other words, they might make complaint to the railroad company, and we would not know anything about it.

Q. I mean, so far as you are concerned?

A. Yes.

• • •

A. Generally speaking, I would say that we are satisfied with the service; yes, sir" (286-7).

Witness Dinkel:

"Q. You are working for The Pennsylvania Railroad Company at the present time, are you?

A. No, sir; I am not — well, I operate the truck, or my men do; I hold the contract, and my men do the pickup and delivery work.

Q. Well, then, you are making pickups and deliveries for The Pennsylvania Railroad at the present time, are you not?

A. Yes (296).

Q. You have been working for the railroad for about how long?

A. For about four years (298).

Q. Did I correctly understand you to say that you are getting all your shipments at the present time over the Pennsylvania Railroad?

A. Yes" (294).

This man's connection with the railroad was not even hinted at on direct and developed only accidentally on cross examination. That fact was deliberately concealed. He admitted that he had appeared at the hearing at the request of the railroad (297).

The last of the shipper witnesses (McDowell) testified:

"Q. Yes. Well, your business is satisfactorily served, so far as transportation is concerned, at the present time, is if not?

A. Yes, sir; generally speaking.

Q. The transportation facilities which you have available from the Pennsylvania Railroad and all the different truck lines that serve you, are adequate to meet your needs, are they not?

A. Yes (304-5).

Q. When was the last time that the Pennsylvania Railroad fell down in its service to you?

A. Never.

Q. It has never fallen down yet?

A. No.

Q. Then, the railroad has satisfactorily taken care of you at all times, has it?

A. Yes, sir" (307).

The applicant has summarized the examination of their shipper witnesses on the subject of the adequacy of existing service in the following language set out in their brief below:

"Present service of the Pennsylvania Railroad and the various truck lines that are serving us are adequate unless they could improve on the service in some way or other of course" (Tr. 318-319).

In objecting to some of our cross examination of these four witnesses as to their knowledge about the applicant and the kind of service to be furnished, applicant's counsel stated that they were not submitting any of the shipper witnesses to establish that there would be any saving of time or any other improvement as a matter of fact (279-84). Mr. Yockey specifically said that:

"these men know nothing about the operation of the railroad, or practically nothing" (281).

This last shipper witness also admitted that he would have no objection to having the proposed service furnished by existing carriers (306). *This admission by the terms of the stipulation is also made part of the testimony of all of the balance of the witnesses.* It was expressly agreed that the entire cross examination of the four witnesses who had been presented on the stand should apply as the cross examination of each of the witnesses not so presented. In other words, all of the questions and answers we have cited above from our cross examination of the four witnesses who took the stand is to be considered as the cross examination of all of the balance of the witnesses. *This means that each and every one of those witnesses, therefore, has specifically admitted that existing railroad and motor carrier service is adequately serving his transportation needs* (309).

The railroad and the applicant now admit this to be true. (See Railroad Brief 13-14). But when they say that these witnesses testified that this improvement in service was "fast becoming more and more of a necessity to them", they are going far beyond any reasonable interpretation of the record. Our review of the evidence in the preceding pages of this brief indicates that every witness freely admitted that present rail service is completely satisfactory

— not a one registered a single complaint about time in transit. The record references they cite deal with the witnesses Caton, Button and McDowell. Caton and McDowell did not say anything about this becoming a great necessity — they merely stated that they would "like" the service. We invite careful scrutiny of all of the testimony of the witness Button. He is the only one who even mentioned competition. All he said was that in these times faster service would naturally be satisfactory. But he did not state that the lack of such speed had in any way interfered with their business — he did not say that it was badly needed. *And he is the only witness who used the word.* It is not a rational inference therefore to say that there is a necessity shown for all shippers, towns and routes, when only one shipper at one town makes this weak assertion — and which he contradicted when he admitted later that present rail service is adequate (286-7). This is not the *substantial* evidence required.

The further statement in their brief that witnesses said that this improvement in rail service was "an absolute necessity" is not supported by the citations they give. In each instance the stereotyped question was asked whether this service would "serve the convenience and necessity of your particular business." But at no point was any witness even asked to delineate any reason why or to point out in what particular the lack of that expedition made the improvement necessary. In view of their admissions to us, on cross examination set out earlier, this general answer that the improvement would "serve" their convenience and necessity is valueless.

The applicant's proposed service does not differ from that of all other common motor carriers. The applicant's chief witness (Christie) was only able to say on cross examination:

> "A. For the reason that any freight which is hauled by The Willett Company will be handled on Pennsylvania Railroad bills — on Pennsylvania Railroad tariffs, and Pennsylvania Railroad bills of lading. They will be responsible for it, and for that

reason I would say that the operation of The Willett Company is different from any common carrier truck company.

• • • •

MR. ANDERSON: That may be true; but then, I asked you another question. I asked you the further question: 'Is that your only reason?'

'A. Well, it is the only reason that I can think of right now. There may be different reasons, but I don't know" (379-380).

No other fact was presented on this subject of "difference". The railroad forms will be used — the solicitations will be by the railroad — that is all. This makes it clear why the Commission brief states that the Commission had already established as a matter of law, that service for a railroad is different. This makes it clear why they refrain from citing any of the evidence on the subject.

The second witness (Symes) was not asked to and did not detail any claimed difference in the character of this service and that of ordinary common carriers. The third witness, however, (McArdle) the applicant's general manager, tried on cross examination to distinguish between the proposed service and that of the ordinary motor carrier by saying that it would be restricted to service for the Pennsylvania Railroad. After much quibbling and a reprimand by the Joint Board (216), he finally admitted that the actual physical manner of operation would be the same as that of any other motor carrier:

"Q. Now, Witness, when a common motor carrier comes up to the dock of a shipper, is there any difference in the way that that carrier handles the freight at the dock of the shipper and the manner in which you will handle the freight at the dock of the railroad company, under the description which you have just given me?

A. No, sir" (213).

Applicant's first and principal witness (Christie) admitted that he did not know whether or not the claimed savings to the railroad could be attained as well through use of existing carriers:

> "Q. You testified in that connection as to savings that might be effected by the rail-truck movement, meaning The Pennsylvania Railroad and The Willett Company, between certain points, and from certain points; *and I will ask you now to state if that same saving could not be effected by The Pennsylvania Railroad interlining and transferring its freight at the break point shown there, to other authorized common carriers operating over the same route as you are proposing to operate over here?*
>
> A. *I don't know.* The question is such that I don't want to answer it, or try to answer it, any other way than what I have. I don't know what we could do, because I haven't investigated into it" (380-1).

In face of such testimony by applicant's own chief witness, how can the Commission be upheld in contending that we cannot furnish the service "as well as" the applicant?

But that lack of knowledge was not the sole reason why the railroad would not make use of existing motor carrier service:

> "Q. (BY MR. CLARDY): Witness, would you, — or rather, would the railroad company which you represent, under any circumstances avail itself of the service of any common motor carrier operating over the routes in question, or any part of them, even though that service might be equal to or better than that which is proposed by the applicant in this proceeding?
>
> A. No, sir" (419-420).

This is the real reason why the grant was made. The railroad will not "co-operate" or "co-ordinate" with ordinary carriers — the Commission has said in other cases

that it cannot compel such action by the railroad — hence the grant. The Commission repeats this in its brief.

At another point this same witness was asked whether he had made any study as to what economies could be effected by using existing motor carriers. He stated that he had made "none whatever" and that:

"we are not interested in that" (383).

In substance we proved without challenge that there is adequate available common motor carrier service on all of the routes. Not only that, but we proved that several of the protestants were then engaged in furnishing precisely the same sort of service for the Pere Marquette Railroad over a number of routes in the same general Michigan territory. In passing, it should be noted that for years one of the routes involved in the application has been and is now being served by an independent motor carrier under contract to the railroad. He will be eliminated if this Commission order is upheld. His service has been satisfactory.

The statement on page 9 of the Railroad Brief that "none of the existing independent operators who protested the application served all of the points in question on the railroad's line" is not true. The very pages they cite disputes their contention. And the Commission has expressly found to the contrary. But since each of the seven separate routes is to be a separate operation, and with the service of not less than two competing carriers available on each route, this is unimportant any way.

The amazing statement that existing carriers' schedules would not fit properly into the connecting rail movements set out on page 9 of their brief is exactly 100% contrary to the evidence. *Our witnesses expressly stated on the very pages they cite that they would run additional schedules if necessary to meet the railroad demands.* But they pointed out that the rail schedules would not result in the expedition claimed because of conditions at these small towns. Later on we forced the designer of

the truck schedules (Christie) to admit that the schedules undoubtedly would have to be changed (367-8). But since the Commission has made no finding on this subject the point is of no moment.

The evidence does not establish, as they assert, that the service of the independent operator on one of the routes is not satisfactory. We ask the Court to read the transcript carefully on that point (390-91).

Our witnesses also established without challenge that the service here proposed is exactly the same as ordinary common motor carrier service and that it is the same as the service being performed by the protestants for the Pere Marquette Railroad. The several witnesses also indicated a desire, willingness and ability to furnish this service for The Pennsylvania Railroad.

One of the carriers had testified that they had offered their service to the railroad only to have it refused.

> "A. As a matter of fact, I have already offered my service to The Pennsylvania Railroad, but they replied that they were already well taken care of by The Willett Company and Pennsylvania Truck Lines" (456).

The Commission has expressly found that these things are true and that several of the protestants could furnish the service proposed by the applicant. This is so important we set forth the exact language of the Commission order:

> "Protestant, Parker Motor Freight, of Petoskey, operates a general-commodity service in interstate commerce from Grand Rapids to Mackinaw City, Traverse City, and Harbor Springs, Mich., over routes which duplicate a portion of the proposed routes. However, this carrier does not serve intermediate points between Grand Rapids and Cadillac nor Lake City. *If the railroad were to offer its less-than-carload freight to this carrier, the latter could render overnight service between Grand Rapids and points on its routes.*

Another protestant, O. I. M. Transit Corporation, of Fort Wayne, performs a similar service between Fort Wayne and Kalamazoo, serving all intermediate points. Three of its vehicles operate daily between Fort Wayne and Kendallville and two between Fort Wayne and Kalamazoo. *This carrier is also willing and able to handle the less-than-carload traffic of the railroad.*

Norwalk Truck Line Company, of Norwalk, Ohio, has 600 units of equipment and operates between Fort Wayne and points in Michigan south of Grand Rapids. The proposed route between Fort Wayne and Grand Rapids will duplicate a portion of this carrier's routes. *It performs overnight service between those points and is also willing to accept motor-for-rail shipments from the railroad.*

Dallas L. Darling Truck Line, of Grand Rapids, operates between Grand Rapids and Cadillac, and renders daily service between Grand Rapids and Big Rapids, Mich. *At the time of the hearing it was serving the Pere Marquette Railroad in substituted service and it would serve the Pennsylvania Railroad in like manner if given the opportunity.*

Associated Truck Lines, of Detroit, Mich., operates approximately 400 pieces of equipment. *This protestant renders daily service between points covered by the application and has equipment available to serve all of the proposed routes.*

Inter-State Motor Freight System, Inc., of Grand Rapids, operates between Fort Wayne, Traverse City, and Petoskey, and between Grand Rapids and Muskegon. It has "peddler" runs from Fort Wayne to Sturgis, Mich., from Sturgis to Kalamazoo, Mich., and from Kalamazoo to Grand Rapids. It operates approximately 300 vehicles in Michigan and had 50 idle vehicles in that State at the time of the hearing. *Shortly before the hearing, it made arrangements with the Pere Marquette Railway Company to perform motor-for-rail service for that line.*

These findings are more than justified by our evidence. See pp. 442-445; 456-460; 517-520; 593-600; 606-611; 641-650; 656-663.

The assertions on page 11 of the railroad brief about truck lines not desiring a certain type of traffic is not supported by anything on the pages they cite, nor by anything else in the record. Because of the many errors in the railroad's brief in interpreting the evidence, we ask the Court to scan every page they cite with great care. In this particular instance they are asserting that the carriers are not interested in small shipments but the first witness whose testimony they cite is a shipper who did not say anything on the subject in question. The next page citation (495) likewise deals with testimony of a shipper who did not even mention the subject this page in the record is supposed to support. There is no reference to this subject at pages 642 and 656. The last citation (662) has to do with the testimony of the representative of a single carrier operating between Fort Wayne and Kalamazoo. What he said pertains only to his own company — it does not refer to any other carrier or to any other route. But a complete reading of his testimony discloses that he did not say that they did not desire to handle these small shipments. Indeed, at page 664 he specifically said that they were handling such shipments. This misleading statement is typical of a number of others we find in their statement of facts and illustrate the way in which an erroneous picture is given by paraphrasing instead of citing the actual testimony. We turn now to the legislative history of the Act.

Legislative History of the Statute

The Act was initiated a number of years before its enactment by the National Association of Railroad and Utility Commissioners. The late Honorable Joseph B. Eastman, in his appearance before the House Subcommittee on Interstate and Foreign Commerce, had this to say:

> "Now, so far as the bill itself is concerned, this bill originated in a bill that was drafted by the Na-

tional Association of Railroad and Utility Commissions, by the committee on legislation of that association, and it derived in turn from a bill which was largely worked out by that association in co-operation with a committee of the Association of Railroad Executives, representing also the electric lines, and a committee appointed by the American Highway Freight Association, a trucking organization which has since been merged into the American Trucking Association, Inc. That bill eventually took the form of the so-called 'Rayburn bill'.

Last year when I recommended the regulation of motor carriers we took the Rayburn bill as the nucleus and adopted it with a few changes in certain respects. Since that time various criticisms and comments have come in and as a result of these, where we thought that the criticisms were warranted, we made certain modifications in the bill which we submitted last year, resulting in H. R. 5262 which is before you."

P. 36 January 19, 1935 Hearing Report.

It so happens that plaintiffs' counsel served as chairman of the legislative committee of the National Association of Railroad and Utility Commissions mentioned by Commissioner Eastman during the time the Rayburn bill was being put together. We appeared before the Committees of Congress in January of 1934 in that capacity. The witnesses generally, including Commissioner Eastman, referred constantly to the experience of the states in drafting, enacting and administering state statutes. It would indeed have been strange if a bill with such an origin had not reflected this state experience in many ways. The changes in our bill mentioned by Commissioner Eastman were not in the section under consideration here.

At another point in his statement to the committee, Commissioner Eastman said:

"Now, the specific objectives of the bill are, first of all, to guard against a further oversupply of

transportation service, and that is done by the provisions for certificates of convenience and necessity or permits to operate. This is a provision which we found necessary in the case of the railroads and adopted in 1920. It has been a part of the Interstate Commerce Act, so far as the railroads are concerned, since that year, *and in my opinion the situation in which the railroads now find themselves would have been considerably better if it had been a part of the law long before 1920, because many railroad lines were built for which there was no proper need. This provision is an endeavor to control the supply of transportation and prevent it going beyond legitimate needs, and it has been characteristic of the regulation of motor vehicles in our States* and in other countries. It has been a uniform requirement, I think, in all the States which have undertaken to regulate motor vehicles in this country * * *".

P. 27 House Committee Hearing Report.

At yet another point he said:

"We undertook at the start to find out what the State Commissions have been doing in the regulation of motor vehicles, because they have gone very extensively into that regulation and have had much experience with it. We wanted to find out what powers they endeavored to exercise and how successful they were in the use of those powers; what difficulties they had met with and how they felt those difficulties could be overcome."

P. 25 House Committee Hearing Report.

At yet another point in his discussion of the purposes and intent of the Act, Commissioner Eastman, after pointing out that the railroads were in favor of the regulation of their competitors, stated that if those railroads were "given an absolutely free hand" they could go very far towards eliminating some of their competitors (38). He

then elaborated on that statement when a member of the committee asked him if freedom from a regulatory restraint would not also eliminate the railroads. He said:

> "I think that is the reason why they are not anxious to have regulation much relaxed; but if you would permit the railroads, for example, to operate freely and without restraint, so far as competition with water carriers is concerned, I think they could do in many cases what they did in the early days; *they could eliminate much of the water competition not only by cutting their rates but also by refusing to enter into joint rates with those lines.*"

P. 38 House Committee Report.

In his testimony before the Senate Committee, Commissioner Eastman repeated and emphasized the things he said before the House Committee. He said at one point:

> "The most important thing, I think, is the prevention of an oversupply of transportation; in other words, an oversupply which will sap and weaken the transportation system rather than strengthen it * * * The States have, I think, in all cases, found the necessity in their regulation of motor transportation to provide for that prevention of an oversupply." (P. 78).

Senator Wheeler, in discussing the bill on the Floor, made it very clear that the regulation of motor carriers was to be carried on entirely separate from the regulation of railroads. In Volume 79 there will be found a considerable amount of discussion on this subject. At one point the Senator said:

> "There has been a fear upon the part of some people — in my judgment, an unfounded fear — if the administration of this bill were turned over to the Interstate Commerce Commission, *that Commission might regulate bus and truck transportation in the interest of the railroads and not in the interest of the*

general public, and that it might not give bus and truck operators a fair deal."

(C. R. 5883).

Some discussion then ensued by others who had voiced similar fears. We find the Senator finally saying:

"Coordinator Eastman has suggested — and we *have written the subject into this bill specifically — that bus and truck operations should be viewed by the Commission in the peculiar light of their particular business*, and that railroad rates should not be the yardstick for the rates which should be established for bus and truck operators."

(C. R. 5952).

One of the members of the House — Mr. Sadowski — had this to say:

"Section 202 sets forth the declaration of policy and vests jurisdiction in the Interstate Commerce Commission. I want to say in this connection that in reporting out this bill your committee has no intent to undertake to suppress or restrict in any way the proper development of motor-carrier transportation by responsible carriers for the good of the public interest. *Nor do we want motor-carrier transportation subservient to or restrained or curtailed by any other transportation medium.*"

(C. R. 12684).

This same Congressman in commenting on the section dealing with consolidations said this:

"Section 213 provides that the Commission shall control the consolidation, merger, and acquisition of control of motor carriers. I will say in this respect that it is the intent, and it is important to the welfare and progress of the motor-carrier industry that the acquisition of control of the carrier be regulated

by the Commission *so that the control does not get into the hands of other competing forms of transportation, who might use the control as a means to strangle, curtail, or hinder progress in highway transportation for the benefit of the other competing transportation.*"

(C. R. 12685).

These citations bear out our contention on several points. The fact that the bill was originally drafted by a committee of State Commissioners and that relatively few changes were made is evidence that the language was used in the same sense as in state statutes. The Ohio Supreme Court, in the only case on all fours with this one and cited elsewhere in this brief (79) (New York Central Railroad Company v. Public Utilities Commission, 123 Ohio St. 370), has pretty well summarized the holdings and interpretations of State Commissions and State Courts. With this parentage the importance of the decisions of state authorities cannot be overestimated.

The above citations should also demonstrate that the Committee well understood that the main purpose of the bill was to remedy a condition brought about by an oversupply of transportation service. We think it equally clear that the existence of adequate service was understood to be a bar to the grant of new certificates.

It is also certain that the Congress was making sure that the railroads were not to be permitted to run away with things. At one point Commissioner Eastman said:

"Well, if it is different, it was put in there for this reason, *that there has been a great deal of fear expressed on the part of the motor carriers that the Commission in its regulation of motor vehicles would not give consideration to conditions which are peculiar to motor vehicles and that it would be guided by railroad conditions in the regulation of motor vehicles.*"

P. 35 House Committee Hearing Report.

This statement, when coupled with his prior one to the effect that the railroads could very effectively destroy their competitors by refusing to enter into rate arrangements with them, should be a clear indication that the Congress had many reasons in mind why the railroads should not be given unfair advantages. The wisdom of those statements is demonstrated in our own case where the Commission and the railroad are arguing that a new certificate should issue simply because the railroad will not establish through routes and will not enter into any kind of an arrangement with existing carriers. *This case has been decided on the strength of railroad conditions — conditions peculiar to motor carriers have not been given consideration.*

The Attorney General in summing up his attitude on this question, in the companion case, had this to say:

> "In furtherance of its policy of competition in the transportation field, Congress has prohibited the control of one form of transportation by another except under the most limited of conditions. Thus in 1912, Congress announced its policy of preserving the independence of water carriers by including in the Panama Canal Act a provision designed to prevent their domination by railroads. In 1938 a similar proviso was inserted in Section 408 (b) of the Civil Aeronautics Act. Likewise, in Section 213 (a) of the Motor Carrier Act of 1935, Congress undertook to preserve the motor carrier industry from domination or control by other forms of transportation which 'might use the control as a means to strangle, curtail or hinder progress in highway transportation for the benefit of the other competing transportation.'"
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> * * *
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> "This legislative policy was evolved out of years of experience. Seldom have new forms of transportation been developed by those engaged in operating the older means of transportation. On the contrary, the older transportation agencies have generally resisted the new, and have entered the new field only after its commercial possibilities have been

demonstrated and the more progressive form has come to be regarded as a competitive threat to the old. Then the purpose was generally to suppress the new form of transportation in order to protect investments in the more obsolete methods."

Other Expressions of Congressional Intent

The provisions of the section (5) dealing with purchases by railroads clearly indicates a congressional intent to keep railroads out of the motor carrier field except under special circumstances. The statute specifically says:

"Provided, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

Is it not rather anomalous to now argue that the Congress did not have a like intent in connection with new applications for certificates? Having erected a hurdle in the way of railroad acquisition by purchase, is it sensible to argue that the Congress has deliberately adopted a wholly contrary policy in connection with convenience and necessity cases? Is it reasonable to say that this plainly expressed congressional intent does not apply to the entire Act? Is it sensible to say that Congress would make it difficult for the railroads to purchase and yet, at the same time, completely undo that policy by permitting the railroads instant and automatic entrance into the motor carrier field under the doctrine governing our case?

Since the original enactment, Congress has had occasion to note with some alarm the fact that the Commis-

sion has been interpreting the Act contrary to the congressional intent. The Transportation Act of 1940 brought together the statutes regulating rails, motor carriers and water carriers. As we have noted, Congress was apprehensive about confiding jurisdiction over motor carriers and water carriers in a Commission which some thought was railroad-minded. Some very harsh words were expressed on the Floor of Congress and in committee meetings on that aspect. It took some considerable assurance from various sources to satisfy many members of Congress on this score. Senator Clark in addressing the Senate on July 1, 1943 (89 Congressional Record pages 6908-6912) made the point that the Senate had been specifically told that certain fears concerning the possible interpretation of the Transportation Act by the Commission were unjustified. At one point he said:

> "We charged then that what has happened would happen; that the Interstate Commerce Commission, a railroad-minded body, would deliberately start out to destroy all efforts at water transportation. The senate saw fit to believe protestations which were made against any possibility of such an occurrence, but what we predicted has unfortunately and lamentably come to pass."

Senator Wheeler quite wrathfully pointed out that the Commission had made rulings "both contrary to the construction which I have placed on the law and the construction which I told the Senate would be placed on the law". He went on to say that the Congress had been of the belief that the Commission would fix rates and do other things in a way that took into account "the inherent advantages of the different forms of transportation". He then made a most startling assertion:

> "There is a concerted effort now being made to permit railroads to get into the truck and bus business. When Congress reconvenes after the recess I intend to introduce proposed legislation to prevent railroads from owning busses and trucks. I think the railroad business should be divorced from the bus and truck business • • • I think the railroad

should not be in the water transportation business, and I think they should not own air transportation facilities. I know the idea exists in the minds of many persons in this country that all forms of transportation should be owned by one group. If that ever happens we will have no competition in transportation in the United States."

Senator Wheeler was and still is Chairman of the Senate Committee on Interstate and Foreign Commerce. His remarks concerning the purpose and intent of Congress in enacting the legislation ought to be given great weight by this Court. When coupled with the other things we have cited it should be apparent that the interpretation placed on the Act in our case is wholly contrary to the intent of Congress.

There is yet another portion of the Act which makes it clear that the Congress intended to keep railroads out of the motor carrier field — at least to not favor them with a special interpretation of the statute. In Section 202(c) the Act specifically exempts certain terminal area motor carrier operations of railroads from the operations of the statute. This Section expressly provides that:

"the provisions of this part shall not apply —

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I or by a water carrier subject to part III, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection or delivery services; *but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad and transportation subject to part III when performed by such water carrier.*

"(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, motor carrier subject to this part, or a water carrier

subject to part III, in the performance within terminal areas of transfer, collection or delivery services; but such transportation shall be performed by such carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental."

From the standpoint of statutory construction, it is significant that the Congress has expressly singled out these specific motor carrier operations by a railroad. It should be noted that the Congress has expressly said that such exempt operations shall be "regulated as transportation subject to part I". It is equally significant that the Congress declared:

"such transportation shall be considered to be performed by such carrier as part of, and shall be regulated in the same manner as, the transportation by railroad * * *."

This is a clear indication that all other motor carrier operations of a railroad shall be subject exclusively to the terms of the Motor Carrier Act. It is an express declaration that all other motor carrier operations by or for a railroad shall be in the same category as those carried on by anyone else. It indicates the Congressional intent to insure the regulation of motor carriers without reference to any other form of transportation.

In determining whether the public convenience and necessity requires the institution of a new motor carrier service, the Commission is not empowered to take into account rail, water or air service. It was emphasized before the Committees of Congress that the issues in motor carrier cases would not be determined on the basis of whether the railroad service was sufficient for the public need. As Mr. Eastman pointed out, motor carriers were apprehensive on that score and, therefore, saw to it that a separate statute covered the Commission power in this field.

In our case everything the Commission recites in its order in presumed justification for the grant has to do

with railroad service. Instead of determining whether there is adequate motor carrier service available, the Commission is trying to establish that the Pennsylvania Railroad service as such is not satisfactory to the railroad. With that as the basic fact upon which everything else turns, the Commission then argues that this automatically entitles the railroad subsidiary to a motor carrier certificate.

Let us put this another way. In ordinary cases the Commission has consistently held that it must be shown that there is no reasonably adequate motor carrier service available, if the applicant is to prevail. In our case the Commission has devoted its time to discovering whether the railroad service is satisfactory to the railroad. They do not specifically find that present railroad service is poor. They only infer that the proposed motor carrier operation will be an improvement. This amounts to saying that a subsidiary of a railroad may obtain a motor carrier certificate by claiming that the rail service of its owner is not completely satisfactory to the railroad. It amounts to substituting rail convenience for public convenience. It applies a test that would not even be proper in a case under Part I in which a railroad is seeking a certificate to construct a new rail line.

We do not know of a single case in the books in which the Commission has held that a motor carrier application must be denied because there is adequate rail, air or water service available. On the contrary, the Commission has repeatedly held that the public is entitled to its choice of service. The Commission has said that the existence of rail service is not a factor in motor carrier cases. How then can it be said that because a railroad believes that motor carrier service will be superior to its rail service, its subsidiary is automatically entitled to a certificate?

Genesis, Development and Basis of Doctrine Governing Decision

We shall demonstrate that the Commission has correctly interpreted and applied the statutory language in literally thousands of ordinary motor carrier cases. *It has*

consistently held that there cannot be a "public necessity" established for a new line if adequate service is available. There can be no need for a new carrier if the public can obtain all necessary service from existing carriers. It so interpreted the same language in Part I dealing with railroads. State Commissions and Courts have given that same meaning to the same or similar language in state statutes.

In our case, the Commission claims it is applying that doctrine. The three crucial paragraphs on which the order turns has several sentences which indicate a complete Commission recognition of the necessity of a showing by the applicant that existing motor carrier service is inadequate. These sentences will be analyzed in detail in subsequent pages of this brief. (See pp. 84-97).

In its argument before the Lower Court, the Commission claimed that the ability of existing carriers to furnish the service had been considered. It said:

> "It should be pointed out that the Commission did not ignore the existence of plaintiff motor carriers or their ability and willingness to provide the service."

In its brief here it now says it gave consideration to the "comparative advantages" of using the applicant or the independent carriers (13). It now argues that existing service can be ignored because it has determined in prior cases that the proposed service is "different". It argues that this "difference" alters the tests — that anyway this "difference" makes it impossible for us to furnish the service.

The Commission is convinced in advance that all railroads should be permitted to operate their own truck lines. *It refuses to concede that a truckline not owned by a railroad can ever furnish adequate service as a connecting line carrier with a railroad.* The Government in its brief below in the companion case to this one* has phrased

*American Trucking Associations, Inc. v. U. S. of America and Interstate Commerce Commission.

it in this language:

> "In other words, whenever and wherever the railroad discontinues its rail service, the Commission recognizes the 'need of substituting truck service' and will authorize it as being required by 'public convenience and necessity'. In adopting a rule such as this, the Commission undoubtedly misapplied the standards prescribed by statute, and fell into a patent mistake of law."

Initially, when considering applications filed by railroads of their subsidiaries, the Commission justified the grant of a certificate by claiming that there was something "different" or "special" about common motor carrier operations when performed between railroad stations. It argued that they were not the same as operations between the stations or docks of other persons. The Commission invented some mysterious language about "coordinated" service. It spoke of "close cooperation" between rail and motor operations and called the result a "rail-truck" service. But at the same time, it emphatically stated that *if the motor carrier service proposed by the railroad was not the continuation of a railroad journey, it was not "special" or "different"*. Accordingly, it imposed a limitation in the certificates which it expressly said was designed to restrict these railroad motor carrier operations to only such as were definitely in this claimed special class. This restriction required a prior or subsequent rail movement.

In tracing the development from that initial step, we shall show that in a short time the Commission ceased to recognize any difference between this so-called special service and any other motor carrier service the rails might wish to furnish. Eventually it decided that the performance of *any* motor carrier service by a railroad made that service "different" from that same service when performed by non-rail owned motor carriers. It continued to justify the grant of certificates by calling the service "special" and "different" but it now took the position that whenever a railroad was the applicant the service just naturally *must* be different for that reason alone —

that the identity of the applicant proved the service "different" and hence justified the grant of a certificate. This resulted in striking out the limitation in the certificate which had restricted the rail-owned motor carrier operations to those where a prior or subsequent rail movement was involved. The Commission let down all bars and now permits the rails to engage in unrestricted motor carrier operations.

The leading case on the subject is *Kansas City Southern Transport Company, Incorporated, Common Carrier Application* 10 M.C.C. 221. In this leading case the Commission recognizes the necessity of a showing by applicant that the existing service is inadequate.

The railroad owner of the applicant in that case sought a common motor carrier certificate that would permit duplication of its rail line. As in our case, it claimed that it would transport less-than-carload merchandise over its rails to some self selected point where it proposed to transfer it to its truck line for completion of the delivery. It called this "coordinated rail-truck service". *But, in addition, it also proposed, exactly as in our case, to have the motor carrier pick up freight at the docks of shippers at points along its rail line and perform all the service by motor truck.*

It should be obvious that the fact that the motor carrier would pick up at a rail dock in one instance, and at the shipper's dock in the other, and would deliver the freight directly to the dock of the consignee, is a distinction without a difference. There is no "close coordination" between trucks and rails in such case. But in this first important case the Commission starts the process of misapplying the statute by arguing that there is a difference in the two situations — that where there is no prior or subsequent rail movement, the service is precisely the same as that of existing carriers *but that where such prior or subsequent rail handling is involved there is a fundamental difference.*

It is upon that argument and that argument alone that this leading case turns. Proof that this is the key to their decision will be found in the statement:

> "However, while it has been shown that public convenience and necessity require the establishment of a service by applicant which will be coordinated with that of the railway, the record is devoid of proof that there is any need for the institution of service by applicant which is not required in such coordinated operations. In other words, *there are plenty of motor carriers in this territory and it has not been shown that there is any need whatever for another motor carrier to furnish service such as the existing carriers furnish and having no close relation to rail operations*" (238).

The Commission agrees that the order must stand or fall on its assumption that the furnishing of "coordinated rail-truck service" is something special and not at all like the service of ordinary motor carriers. Further, proof of this is found in the purpose and nature of the restriction which the Commission imposed in the order. The Commission said:

> "We now come to the question of what restrictions shall be imposed in the authority to be granted *so as to limit applicant's operations to those auxiliary to, or supplemental of, rail service and to prevent it from engaging in operations which will duplicate and compete with service now adequately provided by carriers by motor vehicle*" (238).

The Commission imposed the condition discussed in the following language:

> "Shipments transported by applicant shall be limited to those which it receives from or delivers to either one of the railways under a through bill of lading covering, in addition to movements by applicant, a prior or subsequent movement by rail" (241).

It justified the grant of a new certificate thus limited by arguing:

> "The railway is now furnishing a less-than-carload, or merchandise, freight service which is expensive and in many respects unsatisfactory and inefficient. Through applicant, if the certificate sought be obtained, it proposes to use motor vehicles in coordination with its rail operations in such a way that a merchandise service can be provided that will be much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served. That these results can be achieved, the record leaves no doubt. Moreover, it is clear that the coordinated rail-motor service will be a new form of service, utilizing both forms of transportation to advantage, and differing from the service given by the railway alone or by competing motor carriers alone."
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> * * *
>
> "Is it necessary, however, that applicant be given the desired certificate in order to accomplish this purpose, or can it be 'served as well by existing lines or carriers'"? (235).

It reviews protestant's contentions:

> "These motor carriers are protestants and they contend that whatever coordination of rail and motor carrier service may be desirable can be accomplished by the railway through arrangements with them and utilization of their facilities, or, at all events, that this method of attaining the result sought should be tried before applicant is permitted to establish a new service" (235).

Now note the things the Commission advances as a refutation of the protestant's arguments:

> "The railway regards any such plan of coordination with independent motor carriers as impracticable. It goes so far, indeed, as to suggest that if it contemplated retirement from the handling of merchan-

dise traffic it could do so more gracefully and at less expense than by entering into joint arrangements with parallel competing truck lines, *from which the railway is convinced* 'it could reasonably expect no bona fide coordination or cooperation' " (235).

This discrimination in favor of the rai ad is further shown by the next paragraph:

> "We are without jurisdiction to compel coordinated service between carriers by rail and carriers by motor vehicle. It could only be accomplished through the medium of through routes and joint rates and we have no power to require their establishment. It follows that any such plan must be dependent on voluntary cooperation" (235-6).

This clearly expresses the idea that the railroad wishes and desires must govern. *It overlooks the obvious fact that coordination and cooperation are made impossible only because of the stubborn attitude of the railroad.*

In this decision the Commission admits that under all ordinary circumstances existing motor carriers should furnish the service. It admits that where existing carriers can furnish the service, public convenience and necessity cannot possibly require the addition of a new line. But it claims that where merchandise is to be transferred from one form of transportation to another, a different situation exists.

It is extremely important to note that the only thing in the order that bears on the claim that this motor carrier service is something "different" is the fact that the operation will be between points served by the railroad. Freight will simply move to a railroad chosen point by rail and be transferred to a truck. Rail rates and forms will be used. That is all that furnishes any bases for saying that the service is "different". When the freight does not move by rail it will move by truck. The phrases "substituted service" and "coordinated rail-truck service" mean no more than that. In the proceeding which authorized the use of rail tariffs in this type of opera-

tion, the Commission agrees with our contention that this is simply a joint line service:

> "In either event, where the substituted service consists of a combination of line-haul movements by rail and motor, it is in legal effect a joint service, no matter by what other name it may be designated."

Substituted Freight Service 232 I.C.C. 688.

The evidence reviewed earlier shows that the Commission is wholly in error in its conclusion that this so-called "coordinated" service differs from that of all other common motor carrier service. Even if it did differ, the evidence in our case will not support the arguments the Commission has used in reaching its conclusion. At the moment, however, *we want to again stress the point that the Commission is agreeing with us that the public convenience and necessity does not require a new operation if existing carriers can furnish the service.* This leading case turns on the Commission's contention that because of the claimed special nature of the service, existing carriers cannot furnish it.

The case was then reopened and the restriction removed. In so doing it said:

> "The purpose of the conditions imposed was to limit the motor-carrier service to that which is auxiliary to, or supplemental of, the rail service and to prevent applicants from engaging in motor-carrier operations unconnected with any rail service."

Kansas City S. Transport Co., Inc. 28 M.C.C. 7.

The Commission accepts the argument of the railroad that condition 3 should be eliminated:

> "because it prevents them from providing an economical, efficient, and adequate coordinated rail-and-motor service and results in the continued use of both way-freight trains and trucks, lightly loaded, between various points, and because the performance of all-motor service between certain points is a

necessary and integral part of the plan of coordinated operations" (7).

After repeating the same arguments reviewed above, the Commission says:

> "Under condition 3, truck service may be used between such stations in connection with a prior or subsequent movement by rail, but not otherwise, notwithstanding that the truck service could readily accommodate all the traffic. Manifestly, this seriously limits the benefits in economy and efficiency of service which the substitution of trucks is intended to produce" (9-10).

Now note the way the Commission summarizes factors which impelled the imposition of condition 3 in the prior order:

> "As the above quotations indicate, the thought of division 5 in regard to this matter was that public convenience and necessity required a coordinated rail-and-truck service, which, upon the records of the cases before it, could only be furnished efficiently and effectively by conducting the two forms of transportation under a single control, *but that there was adequate independent motor-carrier service between all stations, generally speaking, so that public convenience and necessity did not require the institution between the stations of new motor-carrier service under railroad control which is not coordinated with prior or subsequent rail service. Hence condition 3.*" (10).

The Commission then disposed of that reasoning in the following language:

> *"Upon further consideration, we are of the opinion that the division gave insufficient weight to the fact that the railroad, as well as the independent motor carriers, has been and is furnishing service* between the stations, but that between many of them the present means of railroad service, the way-freight train,

is uneconomical and inefficient. *This is the reason for coordinating truck service with rail service, and, as we have found (and as division 5 also found), public convenience and necessity require the increased economy and efficiency which will result from such substituted use of trucks.* By the same reasoning, however, public convenience and necessity require the substitution of trucks for way-freight train service regardless of whether there is a prior or subsequent movement by rail. Such substitution is a part of the plan of coordination, and unless it can be accomplished, the full benefits in increased economy and efficiency which the public interest demands cannot be secured" (10).

All this means is that the railroad wants the additional volume it can obtain if it can furnish ordinary motor carrier service. This argument reveals the fallacy in all their reasoning. They speak of the economy and increased efficiency that "will result from such substituted use of trucks", yet grant a right that is not restricted to such alleged "substituted" service. It now considers any service for a railroad to be "substituted" service. When it says that this "substituted" service is needed whether there is a prior or subsequent rail move, it is only agreeing that ordinary service should be permitted simply because the railroad wants the additional revenue it can pick up. This has no relation to whether or not there is a real need. Proof that this is really the ground for the decision is found in the following:

> "One competitive carrier has no vested right in the continuation by another of an inefficient method of operation, and we believe it to be neither the policy of Congress nor the proper function of this Commission to retard any form of progress in transportation which will serve the public interest" (10).

At another point the Commission says that it does not believe that the development of the "coordinated" service will seriously endanger existing carriers but:

"in any event, the public ought not to be deprived of the benefit of an improved service merely because it might divert some traffic from other carriers" (8).

The most conclusive evidence that it is only the needs and desires of the railroads which governs is found in that part of the order where the Commission is developing a basis for the "key-point" restriction. The Commission points out that:

> "The traffic under consideration, which is chiefly so-called package or merchandise freight in less-than-carload quantities, is, of course, traffic which the railroads are and have been under an obligation to transport and which they will continue to transport whether we grant or deny the applications" (9).

The Commission points out, however, that where the railroad intends to continue its through train service without alteration, there is no need for truck service. It says:

> "So far as such traffic can be moved in well-loaded cars on through trains which serve only the larger points, it can be handled efficiently by rail, and the railroads have no need to substitute truck service for such rail service" (9).

The Attorney General, in briefing the companion case below, has so well phrased his arguments against the Commission's contentions, we make them our own.* In discussing the basis for the "key-point" theory as an abstract proposition, the Government said:

> "It seems clear that the entire 'key-point' theory is based directly upon the operating convenience of the railroad, and that the Commission is selecting as key points those which may from time to time be indicated as suitable by the operating practices of the

*American Trucking Associations, Inc. et al v. United States of America and I. C. C.

> railroad. *The Commission seems to take the view that public convenience and necessity requires anything which is beneficial or advantageous to the railroad.*"

The Commission has thus repudiated the basis for the first Kansas City Southern decision. But, in so doing, it does not *directly* discard the test of adequacy of existing service. Its reasoning, however, as indicated above, clearly shows that despite its disclaimer it has, in effect, done so.

The Commission has first justified its grant of a certificate by arguing that "co-ordinated" rail-truck service is "different". Being "different", it says that it cannot be furnished by existing carriers because the railroad will not use such service and that, therefore, the necessary close co-operation cannot be secured — hence the grant. In the second case, however, the Commission says that unless the railroad can furnish both this "different" co-ordinated service and *ordinary* service it will be handicapped — therefore, it should not be prevented from furnishing *all* kinds of motor carrier service. That regardless of existing service the railroad should be permitted to operate freely because otherwise the "special" service will cost the railroad more than it wants to pay.

Accordingly, condition 3 was removed. In so doing the Commission also removed all basis for calling the service special or "different". It removed all ground for saying that there would be no competition with existing carriers. But without noting that the removal of condition 3 and the repudiation of the reasons behind it had made the argument inapplicable, the Commission has continued to cite the language of the original Kansas City Southern decision.

In entire agreement with this position the Government, in seeking to overturn the order in the companion case, phrased it this way:

> "It is obvious from the foregoing reasoning that the Commission, in abandoning the prior or subsequent rail haul condition prescribed by Division 5,

is abandoning also any justification for authorizing the railroad's truck operations because they constitute an element of a co ordinated rail and truck service, of a different character from that performed generally either by rail or motor carriers. *The substitution of pure motor carrier service, differing from the 'adequate independent motor carrier service' already existing only in its being under railroad control, is obviously not the establishment of a new and different type of service beneficial to the public.*

So far as the public is concerned, it will receive from the railroad, acting as a motor carrier, only the same type of all motor service which it would otherwise receive from the independent motor carriers not controlled by the railroad."

In further agreement with our position about this key-point theory, the Attorney General said:

"It seems plain that the 'restrictions' to be imposed by the Commission, under the quoted language, are based entirely upon what the railroad wishes to do."

* * *

"if the railroad wishes to run trains, it does not need to run trucks instead, and consequently 'public convenience and necessity' do not require that the railroad run trucks."

In succeeding cases the Commission has gradually made clear what it has been struggling to say. What the Commission meant was finally set out in unmistakable language in Pacific Motor Trucking Company, 21 M. C. C. 761:

"The points in question are admittedly served by other motor carriers, and protestants on exceptions contend that public convenience and necessity therefore do not require the proposed operation. While adequate motor-carrier service, as such, is no doubt available, we have somewhat consistently refused to

> *compel rail carriers to make their co-ordinate efforts dependent on competing motor carriers.* * * * We have in several instances granted similar authority to other carriers. Illinois Central R. Co., 12 M. C. C. 485, Kansas City S. Transport Co., 10 M. C. C. 221, Seaboard A. L. Ry. Co. 17 M. C. C. 413" (763-4).

In another case the receiver of an abandoned electric interurban railroad was seeking the right to institute new motor carrier operations serving the points between which it had been operating as a railroad. Prior to the issuance of this order the railroad has been authorized by the Commission to abandon all its railroad lines. Because of that fact it was obviously not a case where it could be said that the railroad was "under an obligation" to continue to furnish service. Neither could it be said that the railroad was "merely substituting a more efficient for a less efficient" mode of service. *The railroad was going out of business and wanted to start a new type of service under the Motor Carrier Act.*

It was shown that fifty truck lines and five bus lines served the routes. The Commission authorized the railroad to cease operations.* When the Commission was considering the application to institute motor carrier service, however, it brushed aside all consideration of existing service. It based its grant upon the startling statement that it believed:

> "that applicant should be permitted to *substitute* motor-carrier services for its present rail service and thereby continue to handle the traffic of shippers it has served for long periods of time."

Indiana Railroad Co. Ext. 27 M. C. C. 178.

There is nothing in the order or in the record to justify the grant of authority except the fact that the railroad was going out of business and the receiver wanted to start a motor carrier service. *None of the reasons set out in the*

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*Indiana R. Receiver Abandonment; 240 I. C. C. 359.

Kansas City Southern Cases are applicable. But they were all repeated verbatim. The service would not be in close co-ordination with a railroad, nor would it be in any way different or special.

Commissioner Patterson, in dissenting, has set forth our views so well we quote at some length:

> "Numerous common-carrier motor-truck lines operate in direct competition with applicant's railroad. *It is because of this competition and a preference of the shipping and traveling public for motor transportation that traffic of the railroad has been reduced to a point where the cost of operations exceeds the revenues. For this reason division 4 in Indiana R. Receiver Abandonment, 240 I. C. C. 359, permitted abandonment of applicant's railroad lines.*
>
> Here the majority of division 5 proposes to find that public convenience and necessity require the operation by applicant as a common carrier by motor vehicle over the same routes as traversed by the rail lines and over an additional route. *The fact that applicant did and does operate a railroad is not proof that public convenience and necessity require operation by it as a motor carrier. The law requires the same evidence of convenience and necessity from this applicant as from any other.* The facts negative such a showing. The existing truck lines must have adequately handled the traffic which the report of division 4 finds was diverted from applicant's railroad to them because of the public's preference. This being so, why is another truck line now required? *Its establishment can only result, if it is to be successfully operated in a diversion of traffic from existing truck lines*" (179).

In the second Kansas City Southern Case another Commissioner pointed out that the removal of the restriction meant that the railroad was being granted the right to compete with existing adequate service in defiance of a record that proved there was no need for the new carrier.

Commissioner Lee pointed out that in the first report of the case the Commission found:

> "that there are plenty of authorized motor carriers in operation throughout the territory in which the Kansas City Southern Transport Company proposes to operate; that, with the possible exception of some small stations, the present facilities for the movement of freight wholly by motor vehicle between the points which it proposes to serve are adequate; that the record fails to establish that there is any need whatever for it to provide a service such as the existing motor carriers are furnishing; and that public convenience and necessity require only the establishment by it of a motor-carrier service which will be auxiliary to, or supplemental of, rail service of its parent railroad company and which will not duplicate motor-carrier service now adequately provided by existing motor carriers" (23).

* * *

> 'The result is that they are granted authority to engage in motor-carrier operations and to furnish motor-carrier service which are not co-ordinated with or in any wise tied into operations or rail service *but which, on the contrary, will duplicate the operations and the service provided by existing* motor carriers and found to be adequate to fill the public need" (24).

There then follows some of the strongest and most expressive language we have found in all of the cases:

> "*The act does not authorize us to grant a certificate or permit, authorizing motor-carrier operations by a railroad or its subsidiary, on any less proof of public need therefor than is required of other applicants for such operating authority.* It may be, as stated in the report, that 'one competitive carrier (a motor carrier) has no vested right in the continuation by another (a railroad) of an inefficient method of operation'. *Neither does a railroad or its sub-*

sidiary have a 'vested right' to inaugurate new motor-carrier operations in competition with existing authorized motor carriers without establishing public convenience and necessity therefor'' (24).

Now comes a case in which the Commission has finally taken a position that leaves no room for doubt. In the case of Atlantic Coast Line Railroad Company Extension of Operations — Virginia-North Carolina, 30 M. C. C. 490, the Commission repeated all the earlier arguments and then said:

> *''Protestants assert that Thurston Motor Lines serve all of the points involved, and it may be as contended, that existing motor carrier service is adequate, but one competitive carrier or class of carriers has no vested right in the continuation by another of an inefficient method of operation. Rather, we believe it to be the policy of Congress and the proper function of this Commission to foster any form of progress in transportation which will serve the public interest''* (492).

But now note how differently they view things when the fortunes of another railroad are involved. In one case where it was shown that some of the routes sought would afford service to towns served by another railroad, the Commission denied that part of the application but granted the balance where only motor carriers were serving. It said:

> "The grant of such authority would result in service directly competitive with rail operations of the parent company *as well as service of other rail and motor carriers in the territory.''*
>
> *Gulf, M. & R. Co. Common Carrier Application,* 18 M. C. C. 728.

The Commission then concluded that, while the rest would be granted, the routes:

> "not on the rail line and are not required in the coordinated service, will also be denied.''

These cases mean that if a railroad owned applicant refuses to deal with ordinary motor carriers, it is entitled to a certificate because "in the opinion" of the Commission, there is no conceivable set of facts that could persuade the Commission that an independent motor carrier could furnish the service.

The railroad now argues that the commission has established a rule that will *always* prevent an independent carrier from furnishing the service. They now say that these prior cases have established such carriers cannot furnish the service satisfactorily because it:

> "would depend on their voluntary co-operation and would therefore be likely to be lacking in important elements of co-ordination, with the probable impairment rather than improvement of the railroad's service" (50).

Now obviously this is a rule of law. If this is a reason why independent carriers cannot furnish the service, it is a conclusive one that bars all consideration from the outset — a rule that automatically guarantees no opposition and a favorable order for the rail owned applicant.

The Commission talks only in terms of the so-called "co-ordinated" rail-truck service, yet grants the applicant the right to furnish ordinary motor carrier service. It recognized, in the second Kansas City Southern Case, that such was the result of the removal of condition 3, yet in all these subsequent cases it ignores that plain fact. All its argument is devoted to an attempt to justify the grant of a certificate authorizing the so-called "co-ordinated" service although the certificate contains no such limitation.

The argument about the service being "different" is therefore not on the point unless they mean that the furnishing of any service for a railroad is "different". But if that is the contention, then all this argument about this "difference" making consideration of existing service unnecessary, is only another way of saying that the case is decided before trial. It set up no test — the inherent dif-

ference in speed is an ever-present thing which decides all the cases upon application.

These cases have not been decided on the basis of the evidence presented in each case, but rather on a preconceived and firmly fixed belief that independent motor carriers should not perform the service and that the railroad should not be compelled to use them. The tell-tale sentence that explains every one of these decisions is that cited from Pacific Trucking Company, supra:

> "While adequate motor-carrier service as such is no doubt available, we have somewhat consistently refused to compel rail carriers to make their coordinate efforts depend on competing motor carriers."

Interpretations Applied By Commission in Other Types Of Cases

Implicit in the statute and in the decisions is the requirement that an applicant must show that the proposed service "will be required" by the (1) public convenience and (2) public *necessity*. This is the same meaning given the same language in the Rail Act as set out in Public Convenience Applications of A. & S. A. B. Ry., 71 I. C. C. 784. Proof of one of those elements is not treated as proof of the other. In early motor carrier cases (1937) the Commission said:

> "There is no showing that there is a substantial public demand for applicant's services or that the existing transportation facilities are inadequate to efficiently serve the needs of the public. *The evidence does not disclose that applicant proposes to institute a service of such character that it cannot be supplied or performed by carriers who may have established rights in the considered territory.* Obviously the considered operations are for the convenience of applicant rather than for the convenience of the public."

Rolfsmeyer Common Carrier Application, 1 M. C. C. 652.

"There is no showing in this record that there is any need or demand for this proposed operation or that existing transportation facilities in this territory are inadequate, inefficient, or otherwise deficient. In C. & D. Oil Co. Contract Carrier Application, 1 M. C. C. 329, it was found that existing motor carriers should normally have the right to transport all traffic that they can handle adequately, efficiently, and economically in the territories they serve without the added competition of a new operation."

Louis J. Marini Common Carrier Application, 2 M. C. C. 728.

In another case the Commission disposed of a common carrier application by saying:

"Applicant had no knowledge of the number of truck operators in and around Hagerstown and Williamsport. There is no showing of record that existing transportation facilities in the territory proposed to be served by applicant are inadequate or that there is any real need for his services."

Monninger Common Carrier Application, 2 M. C. C. 504.

In another case the Commission found that an applicant seeking to establish a new service between Chicago and Detroit was attempting to invade a territory served by a great many existing lines. After commenting on the fact that the applicant had been operating and had secured some traffic, it pointed out:

"*No claim is made that adequate facilities for transportation are not now available in the particular territory involved.* Preference of a shipper for the service of a certain operator does not establish the need for such service on the part of the shipping public to be served, as required to be shown by the provisions of the act."

Merrill & Hamel, Inc., Common Carrier Application, 8 M. C. C. 117.

Those early cases have since been followed by some other decisions that repeat and strengthen this interpretation. In a case involving another subsidiary of the Pennsylvania Railroad, we find a situation almost exactly parallel with that in this case. The Division at one point said:

> "The purpose of this extension is to enable applicant to perform substituted service for the railroad in the handling of less than carload shipments between Dayton and Middletown, moving at rail rates and on rail billing and involving, in addition to movement by motor vehicle by applicant, a prior or subsequent movement by rail."
>
> *Pennsylvania Truck Lines, Inc., Extension — Middletown, Ohio*, 34 M. C. C. 828.

The order points out that the Joint Board had recommended issuance of a certificate with conditions:

> "limiting the service to that which is auxiliary to or supplemental of the rail service of the railroad, but not limited to the handling of shipments having a prior or subsequent movement by rail."

In reviewing the evidence, the division then went on to point out:

> "Several shipper witnesses testified to a need for resumption of the service and it is clear that a public need exists for the performance of a substituted less than car load rail service between Dayton and Middletown."

The facts in our case do not reveal any public need for the proposed service. The division in that case reached a proper conclusion when it said:

> "Conceding this public need, *the controlling question is whether or not there is already available a motor carrier ready, able and willing satisfactorily to supply such service for the railroad.* If so, there is no need for applicant's added service in this respect."

The division then points out that the existing motor carriers could perform the service in question. In the last paragraph of its discussion the division said:

> "There is no showing such as we have had in some cases, that the railroad would experience any difficulty whatever in co-ordinating its service with that of Continental. The past satisfactory performance by Continental of the identical service definitely negatives any such claim."

Precisely the same situation prevails in our case. We demonstrated that we were satisfactorily performing this allegedly "special" service for the Pere Marquette Railroad in the same general Michigan area. The order so finds. *No effort was made to contradict our evidence on this point.* Does not such testimony and finding negative any claim that the railroad would "experience any difficulty in co-ordinating service" with that of these protestants? *While no such finding is made in our case, it is one unexpressed reason in the Commission's mind.* Does our evidence not prove that existing service is adequate for this proposed service? Does it not prove then that regardless of whether the service is "special" or "different", it is readily obtainable from existing carriers? And does that not dispose of the whole argument based on that alleged "difference"? How can it be claimed that we cannot furnish the service "as well as" the applicant on such a record?

In line with our contentions, the Commission held in another ordinary motor carrier case that the applicant has the burden of showing that the existing service is not adequate. The Commission there said:

> "Where a certificate is sought in the transportation of commodities generally and to serve a public already served by railroad, express and motor carrier, the burden of proof is upon applicant to show that the latter are not rendering a type or character of service which satisfies the public need and conve-

nience and that the proposed service would tend to correct or substantially to improve that condition."

Norton Common Carrier Application, 1 M. C. C. 114.

In yet another earlier case, the Commission said substantially the same thing:

"The fact that in isolated cases the present operating bus line was unable to carry passengers on scheduled trips is not a sufficient basis to justify the Commission in granting a certificate of public convenience and necessity to another bus line, *unless it be shown that the present bus line, railroads and steamship facilities are inadequate and inconvenient to the traveling public, and that the proposed facility would eliminate such inadequacy and inconvenience.*"

Bluenose Bus Co. Common Carrier Appl., 1 M. C. C. 173.

In another case the Commission was equally explicit in its holding that an application could not be granted unless the inadequacy of existing service was shown:

"Aside from a willingness and ability to engage in the operation of motor vehicles as a common carrier, under the provisions of the act, there must be an affirmative showing that the service is not only required in the convenience of the public proposed to be served, but that it is a necessity on the part of such public. *The latter element includes a showing that the present facilities are inadequate for the transportation of the described commodities between the points involved.*"

Geo. Edmund Jackson, Common Carrier Appl., 1 Federal Carriers Cases 205.

In yet another case we find an especially strong statement of the general rule:

"The substantial question here is whether the evidence establishes that continuance of applicants'

service is required by the public convenience and necessity. We are of the opinion and find that it does not. *The present bus and rail service of protestants described above appears to be adequate for all purposes. Those carriers have been rendering service in the territory for some time, and, in the absence of any evidence that their service is unsatisfactory or deficient in any respect, or that applicants' service is required by the transportation needs of the public residing in the territory served, we are not convinced that there are sufficient grounds for permitting applicants to continue their present operations.*"

White Circle Line Common Carrier Application, 1 M. C. C. 585.

Literally hundreds of cases can be cited to this same effect. We find none contrary. The Commission has admitted that this is true.

Adequacy of Rail Service Not Considered In Ordinary Motor Carrier Cases

Now compare those findings with the statements made in the following cases. In these additional cases the railroads were seeking to defeat a motor carrier applicant by showing that there was sufficient *rail* service. In other words, they were attempting to have the Commission decide a motor carrier case by *taking into consideration the existing railroad service*. In one leading case the Commission discusses at some length the contention on the part of the rail protestant that if satisfactory rail service exists, a motor carrier applicant should be denied. The Commission said:

"They contend that the public convenience and necessity do not require the proposed services and that the grant of a certificate to applicant would be inconsistent with the policy of Congress declared in section 202(a) of the act. One of the bases for this contention is that all of the origins and all of the destinations, except Elkhorn, now have adequate service

by rail. *We are advised by statute that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation but we are also directed in section 202(a) to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages * * *. That a particular point has adequate rail service is not a sufficient reason for denial of a certificate; shippers and consignees of petroleum products are entitled to adequate service by motor vehicle as well as by rail.*"

Bowles Common Carrier Application, 1 M. C. C. 591.

In another case in which no motor carrier opposed the application, the railroads made the same contention. The Commission said:

"Protestant railroads offered evidence that existing *rail* service is adequate and no reason appears for a contrary conclusion with respect to that form of transportation. *We have frequently said, however*, that shippers are also entitled to adequate motor carrier service."

Johnson Common Carrier Application, 10 M. C. C. 5.

These typical cases demonstrate that the Commission has correctly construed the Act to mean that a common motor carrier application is to be decided with reference to conditions in the motor carrier field only. It clearly indicates that neither the Policy Section nor the Convenience and Necessity Section will permit the Commission to take into account evidence concerning railroad facilities. These cases are squarely contrary to the basic consideration which impelled the Commission to its decision in our case.

Commission's Interpretation of Same Statutory Language In Railroad Extension Cases

The language in Sec. 207 of the Motor Carrier Act is the same as that in the Railroad Act governing the issuance

of certificates of convenience and necessity. The Commission has held this same language to mean precisely what we claim. *In an early case under the Railroad Act the Commission has quite plainly agreed with our interpretation of the language.* In that case the Commission, in defining the meaning of the phrase "public convenience and necessity", said:

> "While one of the purposes of the Transportation Act of 1920 was to preserve competition between carriers; *the provisions of paragraphs* (18) *to* (20), *inclusive, of section* 1, *negative any presumption that it was the purpose of Congress to permit the construction of new and competitive lines of railroads where existing facilities are adequate or can be made so by the exercise of available administrative remedies.*"
>
> *Public Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 94.

In yet another case the Commission had this to say:

> "The record does not indicate any urgent need or at present any great public convenience to be served, to justify at this time the construction of the proposed line of railroad. Del Rio & Eagle Pass and the districts surrounding those municipalities are served by the Southern Pacific and the service is generally satisfactory."
>
> *Del Rio & N. Ry. Co. Proposed Construction*, 187 I. C. C. 244.

In defining the phrase "public convenience and necessity" the Commission has said that it implied:

> "both convenience and necessity since the words are not synonymous but must be given a separate and distinct meaning. '*Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the community*'. . . . *The words imply an urgent, immediate public need.*"
>
> *Public Convenience Application of A. & S. A. B. Ry.*, 71 I. C. C. 784.

In another interesting case involving opposition by the Pennsylvania Railroad to the construction of a new railroad, the Commission held that an applicant seeking permission to construct a new railroad has the burden of showing that the territory does not have adequate railroad transportation. The Commission said at one point:

> "The intervening railroad companies point out that their lines or portions of them parallel to some extent the proposed line or railroad or serve a part of the same territory, providing almost an overabundance of railroad transportation, and that the territory involved is completely and adequately served by them."
>
> * * *
>
> "Upon the record the applicant has failed to show that the territory is now deprived of adequate railroad transportation or that there is a public need for the line proposed."
>
> *Ray Greene Proposed Construction*, 228 I. C. C. 792-3-4.

In another case the Commission, in denying a railroad application to construct a new railroad line, said:

> "As hereinbefore noted the territory appears well provided with sufficient and adequate service by existing railroads."
>
> *Elizabeth Southern Ry. Proposed Construction*, 166 I. C. C. 114.

In another case the Commission pointed out that evidence of an improvement in service the applicant proposed did not warrant the grant of the certificate:

> "The new road would doubtless be of service to stock raisers and dealers in furnishing quicker transportation to and from ranges. * * * As compared with present service via the Southern Pacific it would furnish quicker passenger service and save time on express, perishables and other freight in-

bound and outbound between Westwood and California points."

Proposed Construction by Northern California R. Co., 154 I. C. C. 410.

At another point in this same order the Commission said:

"No new territory would be opened that could not be served by existing carriers."

The Commission went even farther than this in another railroad case. It admitted that the record at least partially upheld the applicant's contention that existing service was not adequate but said:

"There is assurance that future service will be adequate."

Proposed Construction of Line by Perry & Southeastern Ry., 124 I. C. C. 346.

In yet another case the Commission indicated its unwillingness to grant a new railroad certificate if there was any possibility of the existing lines meeting the public need. The Commission said:

"Authority to construct the proposed new line will not be granted until we are fully satisfied that a use of the existing rail routes between the Ohio River and the Youngstown district which will produce substantially the results proposed by the applicant is impracticable."

Construction of Branches by Pittsburg L. & W. R. Co., 150 U. S. 55.

In yet another case in which counsel for the plaintiff participated as attorney for the Michigan Public Service Commission, we find the Pennsylvania Railroad actively interested. That railroad wanted to serve a cement mill located at Petoskey, Michigan. It was denied because other railroads were in a position to and could furnish

the desired service. The interesting part is a statement by Commissioner Eastman who dissented:

> "I am not in sympathy with the idea that a carrier can have anything resembling a proprietary interest in traffic or that there is any traffic here for example which 'belongs' to the Pere Marquette or that can properly be spoken of as 'its' traffic."
>
> *Proposed Construction by G. R. & I. Ry. Co.*, 145 I. C. C. 564.

The Pennsylvania Railroad is certainly contending that the traffic in our case "belongs" to it and that such traffic is "its" traffic.

It would indeed be odd if the Pennsylvania Railroad having been denied the right to extend its railroad tracks to serve that industry in Petoskey, should now achieve the same end through the grant of the certificate in this case. As this authority stands that railroad will be enabled to serve the industry involved in that prior case. It is, therefore, possible that railroads generally can thus circumvent the denials of railroad extensions by asking for substantially the same thing through a motor carrier application.

These cases are typical of the many hundreds of railroad cases where this statutory language has been interpreted in the same way. *The Commission has consistently held from the beginning that an applicant, for permission to construct a new railroad line, cannot establish that it is "required by the public convenience and necessity", if there is adequate available railroad facilities.*

Public Interest Is Not Proper Test

The appellants have adopted the position taken by the Commission when they argue that if the Commission believes the grant of this authority is in the "public interest", that opinion will prove that public convenience and necessity requires the grant.

In a case where the question was squarely raised as to whether the term "public interest" was synonymous with the term "public convenience and necessity", the Commission sets out that the protestants had claimed:

> "That public interest is in contemplation of the act synonymous with public convenience and necessity; that the latter term means, in substance, a strong, urgent, public need; and that without such evidence the application must be denied. *In our view these contentions are unsound*".
>
> *James A. Sproul Contract Application* 1 M.C.C. 467.

In a case entitled *St. Andrews Bay Transportation Co., Extension of Operations*, 3 M.C.C. 711, the Commission has pointed out that there is a vital difference between the finance section requirement that the transaction be in the "public interest" and the test prescribed in the public convenience and necessity section. The Commission has, therefore, definitely recognized the difference in the tests, yet, in all of these railroad cases, it has at least implied that it considers the test of "public interest" the governing one. The error is repeated in Appellant's Briefs.

Our order does not make use of this phrase. This idea is indicated in the Kansas City Southern case, however, and in other cases where the Commission has repeatedly said that:

> "There is no question that the proposed rail-truck co-ordinated service is in the public interest."

This was set out in *Pacific Motor Trucking Company*, 21 M. C. C. 761; *Texas and Pacific Motor Transport Co.*, 30 M. C. C. 467; *Atlantic Coast Line Railroad Company* extension of operations, 30 M. C. C. 492; *C. & N. W. Railway Company Extension of Operations*, 31 M. C. C. 457; *Texas and Pacific Motor Transport Co., Extension of Operations*, 33 M. C. C. 38.

The contract carrier section of the act authorizes issuance of a permit only if it appears that the proposed operation:

> "will be *consistent with the public interest* and the national transportation policy declared in this Act."

Contrast this with the section which authorizes issuance of a common motor carrier certificate only when it is found that the proposed service:

> "is or will be required by the present or future public convenience and necessity."

If Congress had intended establishing the same tests for both classes of carriers, it would have used the same language. But we will find many other places in the Act where the test *is* the "public interest". Old Section 13 of the Act has been dropped and Section 5 of Part I now deals with finance matters. That section, in authorizing consolidations, requires the Commission to find that the proposed transaction "will be consistent with the public interest."

At another point in the section the Congress has said that the Commission cannot approve purchases by railroads:

> "unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition."

We call attention to the similarity of that finance section language and what the Commission has said at one point in our order:

> "Furthermore, it does not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carrier * * * (we) are of the opinion that the proposed co-ordinated service will serve a useful public purpose."

A number of succeeding subsections of Section 5 of Part I make use of the phrase "public interest". In Section 210 where the Congress has treated the subject of dual operations, we find a prohibition against a single person owning both a common carrier certificate and a contract carrier permit at the same time unless the Commission:

> "shall find, or shall have found, that both a certificate and permit may be so held consistently with the public interest and with the national transportation policy declared in this Act."

The same language is set out in Section 211 dealing with the issuance of brokerage licenses. In Part III of the Act regulating water carriers, the same test is prescribed in defining the Commission's power and authority over rates. Section 309 of Part III deals with common carrier certificates and prescribes the same test of public convenience and necessity we find in the motor carrier sections. In dealing with the issuance of a contract carrier permit to a water carrier, the Congress has required the Commission to find:

> "That such operation will be consistent with the public interest and the national transportation policy declared in this Act."

The confusion of the terms "public interest" and "public convenience and necessity" has, in part, caused the errors in all these cases. This confused thinking has led the Commission to believe that whatever, *in its opinion*, is in the "public interest" is "required by the public convenience and necessity". While something that has been shown to be "required by the public convenience and necessity" may be in the public interest, *the converse is not necessarily true.* A terrier may be a dog but all dogs are not terriers. The same facts *may*, in a given case, establish that a new line is in the "public interest" and also that it is "required by the public convenience and necessity", but that coincidence does not prove that the *legal meaning* of the two terms is the same. Congress did not make use of them in the same way. Ordinary rules of interpretation prohibit such a construction.

State Court and Commission Decisions

There are a considerable number of State Supreme Court decisions on this question. While it is, of course, true that all state statutes are not precisely the same, the use of the term "public convenience and necessity" has been quite common. The meaning of the term has been determined to be precisely what we have contended for in this case. In substance, the state courts have held repeatedly that an applicant must show either an absence of motor carrier service or that such service is inadequate.

While the issue in our case has never been presented to this Court before, a precisely similar situation did arise in Ohio some years ago. The decision of the Ohio Supreme Court in *New York Central R. Co. v. Public Utilities Commission*, 123 Ohio St. 370; 175 N. E. 596, is precisely in point on both argument and fact. We set forth some extensive citations from that case.

The railroad company, under compulsion, filed an application for an intrastate certificate which was denied. It appealed on the grounds advanced by the railroad in our case. In setting forth the contentions of the railroad, the Court said:

> "The contention that the finding and order of the Commission is unreasonable and unlawful is based principally upon the claims: (1) That the Commission should have considered the substantial economy to the railroad, and the resulting benefits to the public, which it refused to do. * * * It is disclosed that the real basis of the applicant's claim for a certificate is that the motor truck line which it would operate thereunder would be an auxiliary to its existing railroad line between the points named. Indeed, its application is based upon the claim that its operation of such a motor truck line over such route would result in better service at an ultimately less cost to the public" (103).

At another point in the order after discussing the facts with regard to existing motor carrier service and the prior

Commission and Court decisions which had compelled the filing of the application under attack, the Court said:

> "The applicant contends that this truck operation service should be authorized because it is not an isolated independent operation between points named, but is rather a companion service to the service which it provides by rail, and in fact is a substitute for the local freight service formerly operated by it; further that such truck operations are confined to the movement between stations on the line of the railroad, where merchandise is received and delivered; that such operation involves no pick-up or delivery service and is thus made a mere substitute for a more costly local freight train service; further that the proposed operation is not in competition with the business of any existing motor transportation line, in that if this freight were not hauled by truck by this applicant it would be carried by its freight trains; and, further, that the major portion of the shipments handled by it are interstate shipments and cannot be readily separated from intrastate shipments" (105).

The Court will recognize in this language the precise arguments being made by the railroad in our case and adopted by the Commission. In disposing of these unsound arguments the Court said:

> "These and other arguments made by the applicant should be addressed to the legislature rather than to the Public Utilities Commission and this court. The New York Central Railroad Company as an applicant for a certificate of convenience and necessity to operate a line of motor trucks over the highways of the state, and thereby transport freight from place to place within the state, is in no better or different position under the statute than any other applicant for such right and privilege. Under the statute there can properly be no discrimination against it. It is the duty of the Commission under the statute in every case to take into consideration other existing trans-

portation facilities in the territory for which a certificate is sought, and where it appears from the evidence that the service furnished by existing transportation facilities is reasonably adequate the Commission should refuse the application.

This case as presented is exactly the same as it would be if the application were filed by any motor truck transportation company for a certificate covering territory fully and adequately served by duly certified operators. The test of public convenience and necessity must be applied whether the applicant for a certificate to transport freight over the public highways of the state is a railroad company seeking to inaugurate so-called supplemental freight service over the public highways, or an exclusively motor transportation company. The rule to be applied under existing statutes is the same and must be uniformly and universally applied and enforced. The best interests of and the most efficient services to the public do not require a greater number of motor trucks upon the highways of the state than are necessary to supply the public need for such transportation. The public benefit and not private benefit is of first and foremost importance" (105-6).

At another point, in discussing this same question, the Court said:

"Construing these statutes, this court has frequently held that the granting of an application for such certificate is not warranted unless it appears that the public necessity and convenience require the proposed service, and, further, that another motor transportation company, if any, holding a certificate of convenience and necessity granted it by the Public Utilities Commission, covering the same route, is not rendering adequate service, and is not able, ready, and willing to provide the additional service, if any, found to be necessary" (103-4).

The Court in that 1931 case has very clearly set out the answer to every contention made in our case. The facts and argument the railroad relied on are identical with those in our case. Indeed the Court's recitation of what the railroad claimed sounds as though it had been lifted in its entirety from the briefs and the Commission decision in our case.

In case after case it will be found that the courts have said that if there is a service already in the field, a new certificate cannot be granted.

Chicago Motor Bus Co. v. Chicago Stage Co., (1919) 287 Ill. 320;
Choate v. Commerce Commission, (1923) 309 Ill. 248;
Egyptian Transportation System v. L. & N. R. Co., 321 Ill. 580;
Superior Motor Bus Co. v. Community Motor Bus Co., (1926) 320 Ill. 175;
Cincinnati Traction Co. v. Public Utilities Com., (1925) 112 Ohio St. 699;
Coney Island Motor Bus Corp. v. Public Utilities Com., (1926) 152 NE 25.

A number of the cases specifically hold that it is not enough to show that the public convenience will be served by the proposed operation. The Courts have pointed out that there must be a showing that the public necessity also requires the service:

Cooper v. McWilliams and Robinson, (1927) 221 Ky. 320;
Barnes v. Consolidated Coach Corp., (1928) 223 Ky. 465;
Lykins v. Public Utilities Commission, (1926) 115 Ohio St. 376.

In one Ohio case the Court, in interpreting the phrase "public convenience and necessity", said:

"Perhaps it will not do to give the word 'necessity' its literal meaning and hold that, before a certificate

can issue, there must be an absolute requisite for a motor transportation service; *but it must not be wholly devitalized by interpreting it as synonymous with convenience. Necessity, perhaps, in its reference to transportation facilities, may best be construed as contemplating a definite need for a public transportation service in a territory where no reasonably adequate public service exists.* It does not contemplate that every prospective customer may have a non-stop service from the point where he becomes a passenger to the point of his destination, nor that he may have an airline between such points, but only that the public generally, in every territory sufficiently populous to justify the maintenance of a public transportation, shall have reasonably adequate service."

Canton East Liverpool Coach Co. v. Public Utilities Com., 123 Ohio St. 127.

In an Illinois case we find a good expression of the general rule. The Court said:

"To authorize an order of the Commerce Commission granting a certificate of convenience and necessity to a carrier though another is in the field, it is necessary that it appear, first, that the existing utility is not rendering adequate service and it is but a matter of fairness and justice that it be shown that the new utility is in a position to render better service to the public than the one already in the field. It is in accord with justice and sound business economy that the utility already in the field be given an opportunity to furnish the service where it offers and is able to do so."

Chicago R. Co. v. Commerce Commission, 336 Illinois 51.

In another case the Court said:

"It should be made to appear that the inconvenience of the public occasioned by the lack of motor

transportation is so great as to amount to a necessity."

C. R. I. & P. Ry. Co. v. State, (Oklahoma) 252 P. 849.

We have found only the one State Court decision on all fours with our own case. We can find only one State Commission decision in which a railroad has been granted the right to inaugurate a rail duplicating stage line on the theory used in our case. The dissenting opinion, however, contains some most pungent language. After reviewing the railroad arguments which closely paralleled those presented in our case, the dissenting Commissioner said:

"Under this pronouncement, authorization for the substitution by the rail carriers of rail transportation by stage transportation will be a mere matter of routine and presumably the requested authority will be granted by ex parte orders, as no real need will exist for a public hearing."

Re Southern Pacific Motor Transport Company P. U. R. 1929 A, (p. 204).

Application of Commission Theory to This Case

In the foregoing analysis we have tried to demonstrate, among other things, that the Commission has injected a new and unlawful element into its definition of the language "required by the public convenience and necessity." That it was imposing a discriminatory test that can apply only to rail owned applicants and which must always produce a favorable result.

The rule of law, as defined in their brief, is the same as that we have distilled from the cases, although expressed in slightly different language. In describing the tests which it believes to be legally sound, the Commission now says:

"These findings include economies to be effected in the handling of local merchandise freight, increased efficiency, expedited and more frequent local serv-

ice, and release of freight cars for other and more important rail service. *These findings alone rationalize the Commission's action and are legally sufficient upon the issue of public convenience and necessity*" (Commission Brief 12-13).

Such things can only apply to the railroad — the user of the motor carrier service. They are but the normal effects of using *any* motor carrier — not proof that such service is needed. They are advantages that accrue to the railroad. If they rationalize and justify the order, then a railroad need only show that motor vehicles will be employed and a certificate must issue.

What the Commission has actually set out in the order differs widely from the interpretations in their briefs. Their version of the evidence is not supported by the record. These things will become evident as we proceed with a sentence by sentence analysis of the order.

In broad outline the Commission has said in substance:

(1) The obligation of the railroad to transport requires the grant of a certificate even though existing motor carriers are capable of furnishing the service.

(2) The operation will be in substitution for rail service and, therefore, different from ordinary common motor carrier service.

(3) It will be more expeditious and less expensive for the railroad.

(4) Existing carriers cannot furnish it as well as the applicant.

The Commission Brief is not entirely clear as to whether they concede that the adequacy of existing service must be taken into account. The Railroad Brief acknowledges that this is a proper test (49-50). But, as our analysis will show, the Commission, while claiming to apply that test, has erred in the application of the rule because they have based their conclusion on a preconceived opinion which collides violently with the actual evidence.

The Commission Brief does not discuss the first and most important legal rule the order establishes. There is no mention made of the alleged "obligation" of the railroad. But they do agree with our contention that the Commission order has treated the operation as "being essentially an improved railroad service." The sentences we now analyze are set out in the three controlling paragraphs of the order (10-11). The first of these sentences reads:

> "While several motor carriers operate over portions of the routes involved and in some cases perform similar station-to-station service for the Pere Marquette Railroad, it must be borne in mind that the railroad has been and is transporting the traffic in question between its stations and is under an obligation to continue to do so."

If such an obligation warrants a disregard of available motor carrier service, does it not mean that every railroad *must* be granted a motor carrier certificate? Every railroad has a legal obligation to perform its duty as a common carrier by railroad. The Commission is plainly saying, therefore, that because of this legal obligation the public convenience and necessity requires that all railroads be authorized to also operate this new form of transportation.

In the dissenting opinion in the companion case it was said:

> "Congress undoubtedly has recognized the existence of the various modes of transportation and sought to preserve the integrity and the advantages of each, without discriminations, preferences or advantages among them. *A railroad has no authority merely by the fact that it is a common carrier to modify its method of carriage to that of a carrier by motor truck. When it seeks to do so no reason is seen why it is not subject to the same requirements as any other applicant for such privilege. In such case the test is not whether the railroad can carry on its existing business with greater economy and efficiency by*

the changed method of operation, but whether there is a public need for the creation of a new service."

Now note one further incongruous fact. The railroad is not the applicant. This same sentence having been used in other cases where the railroad was the applicant, has been transplanted without their noting that the railroad is not the moving party here.

And unless we are to indulge in some "through the looking glass" reasoning, *this alleged obligation of the railroad will not be discharged by the railroad if the certificate is granted,* but by one who professedly is not the railroad.

No proof was presented as to this rail obligation. It points up our contention that the Commission has determined as a matter of law that all railroads should be permitted to duplicate their rail lines with motor carrier operations regardless of existing motor carrier service.

The Government, in attacking this unsound reasoning in the companion case now before this Court, said:

> "This is obviously unsound reasoning. Even assuming that a rail carrier is under obligation to continue to offer rail service between certain stations, even at a loss, it does not follow that it is under any obligation to furnish motor carrier service between these points. When a railroad establishes motor carrier service, pure and simple, it is undoubtedly entering 'a new field of service.' Perhaps the railroad 'has been * * * transporting the traffic in question' between such stations, but it has no legal right to continue to do so if the public prefers to use some other mode of transportation which is more efficient or economical."

This sentence in the order is an admission that we *can* furnish the service. It is merely an argument that we should not be permitted to do so because the railroad is operating as a railroad and, therefore, should be permitted to have this new and additional right.

In it the Commission recognizes the applicability of the general test as to adequacy of existing service. But it argues that this rail obligation proves that only a rail owned carrier can satisfactorily perform.

This finding cannot be now discarded as unimportant. It is obviously one of the chief legal grounds for the decision. *The Court cannot now say that it was not the basis.* If discarded, what guide remains to tell us with reasonable clarity just what did serve as the basis for the order?

The next recital is the statement that:

> "Applicant's service will be of a different character from that performed by motor carriers generally."

This, according to the Commission Brief, is the controlling legal principle in the case. Earlier discussion has shown that the applicant presented no proof on this subject but that we demonstrated that the proposed service was not different. The Commission now argues that this legal "difference" has been established in the earlier cases. It argues that this "difference" puts it beyond our power to either perform the service or object to the grant.

Is not the Commission unconsciously struggling to establish as a matter of law that motor carrier service rendered by or for a railroad is not the same as identical service for anyone else and that for that reason alone, is governed by a different definition of the controlling statutory language? In other words, is it not defining the statute in a wholly unlawful manner? Note that the *only* thing in the order upon which this conclusion could be based is the recitation that the service will be for the railroad in claimed substitution for rail service.

The preceding finding completely contradicts it. What does it matter whether the service is "different" or not if, as the Commission has found, these protestants are actually furnishing that kind of service for another railroad? Furthermore, the Commission does not directly say that

the service will differ from that of the *competing* carriers — it speaks of motor carriers "generally".

Actually, part will be pure motor carrier service and part joint-line. It is only "different" in the sense that it will be for a railroad. That cannot establish need for a new carrier without proving too much. Is not this assertion intended as part of the general conclusion that we cannot furnish the service "as well as" the applicant. And, if so, is it not wholly contrary to all the evidence?

The next sentence reads:

> "It will be limited to the handling of merchandise traffic to and from points on the lines of the railroad in substitution of train service."

This sentence is but part of the rule of law discussed above. *It is untrue as our citations from the record disclose.* The applicant and the railroad specifically refused to accept a limitation of that sort. They have admitted that the service will include handling between docks of consignors and consignees without any connection with the railroad. The limitation imposed, as we have shown earlier, does not restrict the applicant, as this sentence indicates.

But here again is recognition of the necessity of finding that existing service is inadequate. If this is a basic finding of fact, what is the conclusion it supports if not that existing service is inadequate?

The next sentence is also obviously intended to support the allegation, that we cannot furnish the service "as well as" the applicant.

> "To utilize the facilities of protestant motor carriers, the railroad would be required to make arrangements with several of them, each performing a more or less disjointed part of the service."

Here again the Commission's only reason for making this statement is its recognition of the necessity of establishing that existing carriers cannot adequately supply

the service. But once more we find a statement that is not supported by the record. *Here again the Commission ignores its own findings set out above.* It has specifically found that *at least two of the motor carriers could furnish service on all of the routes* (9-10). The finding is, therefore, contrary to all facts of record. The Commission has merely stated an unsupported conclusion of law that inadequacy must always be an inevitable result of using more than one carrier. But since this application embraces seven separate operations with no through service, this alleged fact has no bearing on the issue. The service proposed is "disjointed" in the sense meant by the Commission. Each route must be treated separately because service on each one has no relation to service on any other except as the railroad insists it wants all the routes.

The next sentence reads:

> "The railroad, through its subsidiary, merely seeks the substitution of a more efficient for a less efficient means of service."

This also reveals part of the concealed rule of law that governs the Commission thinking and order. It is but part of the idea that the statute requires a different meaning and application when a railroad is somewhere lurking in the background. This rule of law, as here suggested, is that if a railroad "seeks" (desires) to employ its own motor vehicles in lieu of rail service, that alone warrants the grant. Another facet of the rule is that, in the eyes of the Commission, the inherent superiority of truck service which makes it "more efficient" than rail service, compels a grant. In short this sentence reveals the application of a wholly improper legal definition.

Obviously this has nothing to do with the question of whether we can furnish the service "as well as" the applicant. *It is not true as the citations above indicate.* The railroad is seeking to engage in ordinary motor carrier service. (See 127-31) (213). The statute will not permit the issuance of any other type of certificate. And this is not a basic finding of fact.

This sentence does indicate, however, that the Commission is employing wholly improper criteria. It is implying that the adequacy or inadequacy of *railroad* service controls the issuance of a *motor carrier certificate*. It is nothing but a conclusion without any support in the record. There is no finding of fact in the order to support it.

The sentence is, in essence, the same as the first in which the railroad obligation was advanced as the reason why this certificate should issue. While it is not clearly expressed, it seems evident the Commission is trying to say that the mere fact that the owner is a railroad justifies the grant.

In passing it should not be forgotten that the railroad is not the applicant. Yet this sentence also carries the implication that it has been so considered in disposing of the case. The proper party is not the applicant.

This suggests yet another difficulty. Throughout these cases it is insisted that this service will be "for" the railroad. If the applicant is not the railroad, how can the connecting line service be considered to be that of a common carrier? Throughout the case it was emphasized that the carrier would not solicit business or publish a tariff. The railroad will have the business contacts with the public and its tariff will be used. The applicant can only be held to be a common carrier by viewing its obligation as that of a connecting line.

If we are to talk about this motor carrier service as though it is part and parcel of the railroad operation, then it is not even under the proper statute. If the contracts make this carrier, in effect, a servant of the railroad instead of a servant of the public, should they not have sought a contract carrier permit? But, in such event, the railroad would then have to be regarded as the shipper which it obviously does not want to do. We submit that the Commission has been too vague and uncertain in most of the order to enable the Court to accurately and quickly determine just what has been in the Commission's mind. But if this sentence is to be given any

rational meaning, we must conclude that this proposed operation will be no more nor less than a common carrier connecting line service.

The next paragraph in the order is devoted to discussing matters entirely outside the record.* Nothing in the paragraph can support the conclusion that we cannot furnish the service "as well as" the applicant. The Commission refers to another case and says that there the Commission had concluded that this so-called "coordinated rail-truck" service differs from either railroad or motor carrier service. It should be noted that there is no direct coupling of that statement with our own case. One statement merits some attention:

> "It is a new form of service utilizing both rail and motor carrier transportation to advantage and in such a way as to render a merchandise service which is much less expensive and at the same time more expeditious and more convenient and generally satisfactory to the public served."

As in the earlier cases and as we have discussed elsewhere, the Commission is apparently trying to say that the proposed operation is not a motor carrier service. It is creating a hybrid which it claims has characteristics of both rail and motor truck service. While the order does not clearly find that such is the situation in our case, it is apparently leaving that implication. Of course it is contradicted by the undisputed evidence establishing that at least part of the service will have no connection with the railroad except ownership. But there is no warrant in law for issuance of a certificate that is anything other than a motor carrier certificate. And since no witness testified to this effect, the conclusion cannot stand.

When the Commission says that the service will be "less expensive" and "more expeditious" it raises many questions. It is obvious that the Commission is comparing motor carrier service with rail service. There is no evi-

*Paragraph 2 on page 11.

dence to support any comparison of this motor carrier service with that already in the field.

The Commission, therefore, is employing improper criteria. It is determining whether the public convenience and necessity requires a new *motor carrier* in the field by arguing that motor carrier service in the abstract, and as shown in another case, is superior to rail service. With that as its major premise, the Commission then concludes that this inherent superiority warrants the grant of the new certificate despite the fact that undisputed evidence in the record proves that existing carriers can perform the service no less satisfactorily than the applicant. The appellants now answer, in substance, that while we may have presented evidence to show that fact, the Commission has laid down as a rule of law, the proposition that service for a railroad by non-rail owned carriers can never be as satisfactory as where there is common ownership — that, therefore, our proof may be disregarded.

The argument of the Government on this point so well sums up our position, we make it our own:

> "If the inherent advantages of motor transportation in particular instances are such that it should be utilized in preference to rail transportation, the logical consequence would seem to be that such traffic should go to motor carriers and not to rail carriers, rather than that rail carriers should seek to transform themeslves into motor carriers in order to continue to handle traffic which can no longer be economically or efficiently handled by them as rail carriers."

This whole paragraph is in violation of due process. If it means anything it is an attempt to decide this case on the basis of evidence in another case to which we were not parties. Which, if any, of the sentences are basic findings of fact as shown by our record? All but the last three sentences are clearly not in that class. As to these three, we submit that only the one relating to service elsewhere can be called a fact. The remaining two are con-

clusions. And it is not stated that they are made with direct reference to this case. The context of the paragraph indicates that it is devoted entirely to history. But if any statement is a basic finding, just what does it support?

The first sentence in the last of these three paragraphs reiterates the argument that there will be a "reduction in cost" and "an increase in efficiency". It reads:

> "The motor-carrier service proposed by applicant, operated in close coordination with the railroad's service, will effectuate a reduction in cost, and will result in an increase in efficiency in the transportation over the routes herein considered, which will inure to the benefit of the general public."

Our prior discussion has covered this argument. Here again we find the comparison of motor carrier service with rail service and the conclusion that the certificate must be granted because of a claimed betterment. The fact that the motor carrier service will be more efficient than rail service does not establish that there is a great public need for that improvement — let alone that a new carrier must furnish it despite the existence of many carriers capable of doing the same thing.

This is not a basic finding. It is a mere conclusion — or series of conclusions. If a reduction in cost to the railroad is a basic finding, then what does it support? It obviously has no relation to the adequacy of service. The statement that there will be an increase in efficiency is so obviously a conclusion, there is no ground for a claim that it is a basic finding. And it is equally obvious that it is related only to rail efficiency. In other words — since motor carrier service is superior, it automatically follows that the railroad should be allowed to change its character. It is a reason that must always produce a favorable order.

The Commission is confusing what it calls a public "benefit" with public convenience and necessity. It begs the main question — is this alleged benefit more than

merely desirable and can it be furnished only by the applicant.

The last sentence immediately preceding the basic conclusion that we cannot render the service "as well as" the applicant states something that is contradicted in every line of the record. The Commission says:

> "Furthermore, it does not appear that the restricted service would be directly competitive or unduly prejudicial to the operations of any other motor carrier."

This is a wholly argumentative conclusion. *But the only evidence in the record is that which we presented showing that there is and will be keen competition.* The argument will undoubtedly be made that all the Commission means is that since the railroad owner now has the business, there can be no competition. This is pure sophistry. The railroad does not hold a patent on any business. Every future movement of freight will be the subject of competition. It will not become railroad freight until the railroad has successfully challenged our efforts to obtain such business. If the present railroad service is poor in comparison with the proposed new motor carrier service, there will certainly be a new and important competitive element introduced if this certificate is granted. Conditions will not remain static. Every solicitation will necessarily include a reference to how much better service can now be furnished — and the standard of comparison will then be the service of present truck lines (389). All this talk about service improvement is meaningless if it will have no effect on the competitive situation. The railroad argues that it wants this certificate (through its subsidiary) so that it will be better able to compete with us, yet the Commission concludes that there will be no "direct" competition.

In reality, the Commission, in using this argument, is not even thinking about the record. It believes that the "close coordination" required can only be achieved through common ownership and somehow uses that as the

foundation for this assertion about competition. It is unquestionably betraying the fact that it feels that a railroad should always be permitted to own and operate its own truck line regardless of all else. *If the argument cannot be answered by a showing that existing carriers can furnish the service in "close coordination" with the railroad, does it not mean that the Commission has determined the issue on the basis of a preconceived belief and policy?*

The Commission's theory in all these cases amounts to treating the inherent advantages of motor carrier service over rail service as complete justification for admitting the railroad into the motor carrier field. The Attorney General phrased it this way:

> "When 'public convenience and necessity' is thus treated as an automatic consequence of what a railroad does, it would seem to follow inescapably that the Commission has in truth adopted 'railroad convenience' as its standard of judgment, and departed from the criterion of public convenience and necessity prescribed by the applicable statute."

In the next finding the Commission speaks of the new operation as serving a "useful public purpose" and concludes that:

> "such useful public purpose cannot be served as well by existing motor carriers."

The evidence discloses without dispute that the existing motor carriers can furnish the so-called "co-ordinated" service "as well as" the applicant. We have cited elsewhere the controlling portions of that testimony to demonstrate that this basic conclusion is completely contrary to every fact of record.

If this determination that existing carriers cannot furnish the service "as well as" the applicant is to be justified, the order must set out several important findings which must find support in the evidence. Obviously the witnesses upon whom they rely to establish that point

must have complete knowledge of the service of all of the existing carriers as well as of that proposed by the applicant if they are to make this comparison. The record must contain positive and clear testimony making such a comparison. The citations from the record set out earlier disclose three important facts: (1) their witnesses were completely without knowledge of the service of any of the existing motor carriers; (2) their witnesses did not make any comparison or give any testimony upon which the Commission conclusion that we could not furnish the service "as well as" the applicant could be based; (3) the protestants presented uncontradicted evidence to show that they *could* furnish the service "as well as" the applicant or any other carrier.

No fair-minded person can find any support in the record for this conclusion unless we start our search by acknowledging that no independent motor carrier can ever perform "as well as" a rail-owned one. Search the briefs and the order as we may, there is nothing cited in support except the bald statement that this is a rule of law that no evidence can alter.

In summary, therefore, we find that the validity of the order depends upon acceptance of a new set of definitions of the statutory language. The order starts out by setting up the rule that the obligation of the railroad owner to transport overrides all other considerations. Next it is said that since motor carrier service, as such, is faster and cheaper (for the railroad) than rail service, all railroads should be authorized to enter this new field. And then they say that the very nature of this "co-ordinated" service demands common ownership.

All these rules of law can never apply to anyone but a rail owned applicant. If sound, no hearing is required. If correct, there can never be a denial order entered.

Protestants Deprived of Fair Hearing

Several rather arbitrary actions by the Commission and the Joint Board conspired to deprive us of our right to a full, free and fair hearing. One of these incidents had to

do with the alleged contract for the proposed service between the parent railroad and its subsidiary. Another had to do with the rejection of proof that would have demonstrated that every shipper witness produced by the applicant had appeared for an improper reason and that the testimony they gave was not true.

It is claimed that the proposed operations are covered by seven separate contracts. At the first hearing the contracts were not produced although the Joint Board allowed testimony with regard to them. During the interval between the first and second hearings we applied for a subpoena duces tecum to compel production of those documents. Without issuing a formal order the Commission denied that request in a letter dated May 28, 1942 in which the Secretary of the Commission said:

> "I understand that the applicant has indicated to the Joint Board that if it considered the contract relevant, it is agreeable to supplying a copy for the record. The Joint Board having participated in the early hearing is familiar with the issues and in a position to judge whether the contract is relevant and material. It is suggested, therefore, that the question of the production of the contract be taken up with the Joint Board at the further hearing and if the Joint Board believes the contract should be made a part of the record, the applicant will supply it" (440).

No explanation for this peculiar procedure was offered. It appears, however, that the Commission must have communicated with the railroad or it would not have made the statements cited. It was with some surprise, therefore, that we found that neither the railroad nor the applicant was willing to produce the contract for our use. It should be obvious that its production would have made it possible to submit that document to our own witnesses in interrogating them with regard to their willingness and ability to furnish the proposed service. It would certainly have afforded us much information for use in cross examining both the railroad witnesses and the applicant's

witnesses. All of the arguments about there being a "difference" in service would have been thoroughly exploded through the use of that document alone.

When we requested production of the contract, both the railroad and the applicant refused to present it unless ordered to do so by the Joint Board (688). We vainly argued about the materiality of the document and discussed at some length the Commission letter cited above. We asked that all evidence dealing with the relationship between the railroad and its subsidiary be stricken if the document was not produced (693-695).

The impression had been created that there was no contract in the hearing room. It was then suggested from the bench that the contract be filed after the close of the hearing. At about that time, however, we discovered that counsel for the railroad and applicant had actually produced the document and had exhibited it to the Joint Board. The members read the document and then refused to permit us to even look at it (693). We vigorously protested and asked several times that we be allowed to have the document for examination and to use it in cross examining the witness then on the stand (693-695). We asked the Court to read that part of the record commencing at page (687-696) dealing with this incident.

With the document present in the hearing room and with the knowledge that the Joint Board had been prejudiced by having it exhibited to them, we naturally moved to exclude it from the record unless we were given the rights to which we were entitled. The Joint Board denied this motion and the accompanying one to strike all testimony dealing in any way with the subjects covered by the contract. The Examiner became very short with us and suggested that we confine anything we had to say to our brief.

This conduct, we submit, outrages all concepts of fair play. If the proposed service is claimed to be beyond our power to perform, it must, in part, be due to the peculiar nature of the arrangement between the parties. While we

have shown that this is not true by other evidence relating to the physical nature of the service, we submit that we were entitled to an opportunity to place their witnesses on record as to what there was in the contract that made performance by us impossible. We submit that it is strange doctrine which permits the Commission, the applicant and the railroad to make full use of the document at the hearing but which deprives us of all opportunity to even see it. With the document before us, we could have safely asked their witnesses to point out the feature in that document which, in their judgment, would have prevented our furnishing the service. The fact that the document itself does not have any such language is important evidence in support of our view but the right to cross examine their witnesses is another right to which we are obviously entitled. And no less important is the right to submit that document to our own witnesses in an effort to demonstrate that they would willingly enter into the same arrangement and that they could and would furnish the service required thereunder. Due process has been denied us.

Also during the interval between the two hearings we conducted an intensive traffic survey along all of these routes. In so doing we discovered that all of their shipper witnesses had appeared at the initial hearing for reasons far removed from those claimed by the applicant. We obtained admissions that bore on all of the important issues in the case. They admitted that they had no need for any changed or additional service. They admitted that they had appeared because they were employed by the railroad or that they depended on the railroad employees for their livelihood. We obtained admissions that proved bias, prejudice, and related matters.

When we sought to present this evidence, the Joint Board refused to allow any of it in the record. While we made an offer of proof it did not, of course, have either the completeness or the force of the testimony itself.

We went to great lengths in trying to persuade the Commission to reopen the proceedings for the purpose of letting us be heard on these matters. We called these

errors to the Commission's attention in as vigorous a manner as decency permits but all to no avail. We submit that the language used by the Court in *Morgan v. United States*, 304 U. S. 1 is particularly applicable here.

SUMMARY

The Court's first inquiry will be directed towards discovering the basis for the ultimate conclusion. Until the Court can see clearly what it is that supports the grant, it cannot determine whether the law has been properly applied or whether proper findings based on substantial evidence have been made. The confused and contradictory nature of the findings here, confront us with an almost impossible task.

Has the Commission decided this case on the theory that the adequacy of existing service must be taken into account? If this is accepted as a necessary element in the definition, has the Commission determined that this includes a consideration of both rail and truck service? If so, where are the basic findings of fact that would justify a conclusion that all such existing service is inadequate?

Or has the Commission considered the adequacy of only one of the forms of transportation to the complete exclusion of the other? If so, which form has it considered? Or has it really considered the adequacy of either form?

Has the Commission rejected as inapplicable the test of adequacy of existing service? If so, what has the Commission substituted as the proper test? And what basic findings have been made in line with that test?

The facts are not complicated: (1) the railroad desires to offer motor carrier service to the public; (2) it has no knowledge of existing service; (3) it refuses to use existing carriers; (4) while part of the operation will be a connecting line arrangement, some of it will be pure motor carrier service; and (5) advantages will accrue to the railroad. All else in the order is speculation or legal conclusion.

We have not contended for the principle of res judicata — we are not raising the question of Commission consistency. Our attack raises judicial questions — not administrative ones. We do contend that these prior decisions show the true character of the Commission's acts. We do argue that the prior decisions of the Commission which hold that a necessary element, in proving that the public convenience and necessity requires a new motor carrier, is a showing that existing motor carrier service is inadequate, are lawfully correct. We do argue that the Commission has insincerely applied this proper legal meaning. In doing so it has adopted an interpretation which applies only to rail owned applicants and which inexorably compels a favorable decision on all requests by such applicants. Its ambiguous findings cloak a hidden meaning and a substitution of a Commission belief for proof on the subject of the adequacy of existing service.

The Commission has applied the statute with an unequal hand. It has made unjust and illegal discriminations between persons in similar circumstances in the manner condemned in *Yick Wo v. Hopkins,* 118 U. S. 356. The mere fact of rail ownership has been the unlawful basis for the discriminatory application.

If the adequacy of existing service is not considered, there is but one thing left. All that remains is the comparison of rail and motor carrier service unless we accept as controlling, the argument about the railroad obligation to serve. But this comparison has nothing to do with the facts in a particular case. It is based on the inherent qualities of the two types of service. Since motor carriers "generally" offer the claimed advantages *just because they are motor carriers,* this argument or basis for the order, if sound, means that all railroads are entitled to also operate as motor carriers. It means that no successful opposition can ever be offered — the test must always produce the same result, not because of evidence, but simply because of the nature of things. In other words, it is an attempted legal definition of the phrase "required by the public convenience and necessity". It is a defini-

tion that applies only when a railroad is involved and which will not permit of a denial.

We contend that the order exceeds all bounds of reason — that no fair-minded person could reach the conclusion that this certificate should issue on the evidence presented. In many cases the Court has said that if the order is beyond the bounds of rational inference, it cannot be sustained. Here all the evidence points in a direction contrary to the decision. Nothing of record warrants the conclusion that a new carrier is required if the public is to receive adequate motor carrier service.

The Commission has based its order on a number of new legal definitions which we contend are improper and unsound. It holds that the alleged legal obligation of the railroad to function as such is an important part of the definition. It holds that motor carrier service for a railroad is always different from service for anyone else. It holds that the inherent superiority of motor carrier service over rail service satisfies the statute. It rules that independent carriers cannot satisfactorily furnish the service because there must be "voluntary co-operation" which the railroad is unwilling to supply. It substitutes its opinion, that only a common ownership can satisfactorily furnish the service, for evidence — it overrides uncontradicted evidence.

Practically all that appellants say on brief has to do with new rules of law. In a nutshell their argument is that motor carrier service for a railroad being highly desirable, is always "required by the public convenience and necessity" but only where the railroad owns the applicant can a certificate issue. Most of the "facts" they advance as the foundation for their argument were not found by the Commission. We have discussed such subjects only because we thought it would point up the other errors.

If Commission orders can only be permitted to stand when supported by substantial evidence and when based on correct interpretations of law then this order must fail on all counts. If the tests by which the Commission au-

thorized the grant are valid, then no railroad can ever be denied — no independent carrier can ever prevail — and the independent motor carrier industry will be driven from the field by a rail-owned transportation monopoly.

We submit that the Court below was correct in setting the order aside.

Respectfully submitted,

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Dated at Lansing, Michigan, March 5th, 1945.